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#8874-A-1969 ELINOR H. KERPELMAN
V. GOVERNOR AND BD. OF PUB. WKS.

KERPELMAN V. MANDEL

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

NO. _____

ELINOR H. KERPELMAN

Petitioner,

vs.

MARVIN MANDEL, Governor, LOUIS L. GOLDSTEIN, Comptroller of the Treasury, and JOHN LUETKEMEYER, Treasurer; constituting the BOARD OF PUBLIC WORKS OF MARYLAND; JAMES B. CAINE, INC., a Maryland corporation, and MARYLAND MARINE PROPERTIES, INC., a Maryland Corporation,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND**

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The Petitioner prays that a Writ of Certiorari issue to review the final judgment of the Court of Appeals of Maryland in the above case, affirming the judgment of the Circuit Court for Worcester County, as expressed in that Court's "Opinion and Order of Court" dated August 31, 1970, in which the Worcester County Court sustained the Demurrers of the Defendants to the Bill of Complaint, and thereby ruled that the State of Maryland *could* divest itself of fee title to submerged lands under tidal waters within the State.

In affirming, the Maryland Court of Appeals went further, it is respectfully suggested, than the Worcester County Court had gone, and shut its eyes and stopped its ears to the current progressive destruction of the environment which is going on everywhere, and as to which this case is a blatant example. The court found that the Petitioner suffered no injury from the filling of Maryland wetlands, the destruction of the lowest link in the aquatic food chain, the loss of ecologically important marshlands, the destruction of various species of fish and plant life, of recreational areas and places of beauty, of areas of repose and esthetic enjoyment; and that, therefore, she had no standing to sue.

CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Appeals of Maryland is reported at --- Md. ---, ---Atl. 2d ---, and is set forth in the Appendix hereto, at pp. 1A to 6A

The opinion of the Court of first impression, the Circuit Court for Worcester County, is set forth in the Appendix pp.1A to 6A In that opinion, the Circuit Court for Worcester County refers to its opinion in a case called Chancery No. 8935. Larmaru Board of Public Works later decided in---Md.---, on May 10, 1971

JURISDICTION

The final judgment of the Court of Appeals of Maryland, the Court of last resort of that State, was entered by way of filing of the Mandate of the Court, on May 12, 1971.¹

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3), there having been asserted below and claimed here, denials of rights, privileges and immunities secured by the Fifth, Fourteenth and Ninth Amendments to the Constitution of the United States. The highest Court of the State of Maryland, in its decision, ruled upon these said matters of denial of rights, privileges and immunities unfavorably to the Petitioners.

1. Although it is believed the practice has always been to measure the elapsement of time for filing this Petition from the filing date of the Mandate of the Maryland Court, it is believed counsel for Maryland Marine Properties, Inc. may argue that the filing of the appellate Court's *Opinion* amounts to final judgment. This is not so, it is respectfully argued.

Rather the mandate is the final Judgment; the Opinion of Court is but an Order *nisi*. See *Marx v Ensor* 146 Md. 603, 605, stating jurisdiction is not reacquired by a lower court until issuance of the Mandate.

See also CJS App. &

Err.1958 at p. 529, at ftnt. 8 and 8,5 and 9 including pocket-part, citing, for example, *Duval v Duval* 291 sw 488; *Mueller v National Hay* 258 sw 741; stating that *final* judgment only occurs on filing of the Mandate in the *lower* Court—a time even *later* than filing of the Mandate in the Appeals Court. To the same effect *Berger v Leposky* 103 so2d 628 (Fl.), *Coutsre v Lowery* 177 a2d 371 (Vt.) and *Durwood v Dubinsky* 361 SW 2d 779. To the same effect is the fact that by common practice in Maryland, Motion for Reargument may be, and in fact frequently is, filed after entry of the Court's Opinion, but not after entry of the Mandate.

QUESTIONS PRESENTED

All of the questions presented seek determination of the reach of the Federal Constitution in protecting a citizen's property, or civil liberties right in the maintenance of a viable environment.

1. Did the alienation of wetlands by the Board of Public Works of Maryland, and dismissal of the Bill of Complaint below amount to a taking of property of the individual Plaintiff, or of the class which she represents, without Due Process of Law in violation of the Fourteenth and Fifth Amendments to the United States Constitution, and in violation of the Ninth Amendment to the United States Constitution, all as applied to the States by the Fourteenth Amendment?

Are submerged lands covered by navigable waters alienable by the State, or inalienable as part of the *jus publicum*? Is the *jus publicum* an integral part of the sovereignty of the state, which the State cannot divest itself of without a constitutional amendment?

Are they inalienable under a trust theory generally?

Are they inalienable under a trust theory under the circumstances alleged in the Bill of Complaint in this case?

2. Did alienation of these lands under the circumstances alleged in the Bill of Complaint violate the Fifth and Fourteenth Amendments, or the Ninth Amendment, to the Constitution of the United States.

3. Are submerged lands flowed by tidal waters inalienable under the Maryland Constitution and the Common Law of England which is in effect now in Maryland; or under Article 6 of the Declaration of Rights of Maryland; was not the failure of the Maryland Court to recognize properly the existence of the Common Law as set forth by the Petitioner, a denial to her of Due Process and a violation of the Fourteenth, Fifth and Ninth Amendments to the United States Constitution, as applied to the states by the Fourteenth Amendment?

4. Are individual inhabitants of the United States to be denied a right to complain in their courts of deprivations of property rights of the most fundamental nature possible, namely, property in an environment which is livable, simply because that preoperty interest is shared in common with 210,000,000

other Americans, and the individual interest of each may thus be denigrated by a court, such as the Maryland Court, which stated that the remedy was not *with the Court*, but with the legislative branch of the state government. (Last sentence of the Maryland Opinion.) Is not such a reading of the "standing" question a denial of Due Process under the Fourteenth Amendment?

5. Is the contention of the Maryland Court of Appeals that in environmental suits, in order for an individual citizen to sue, he must have "a special interest, different from the general interest of a member of the public," a denial of Due Process or Equal Protection of the laws, when the citizen seeks to reclaim, as here, ecologically important lands which have been given away to real estate speculators and developers by a state agency?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves the following:

1. A portion of the Fifth Amendment to the Constitution of the United States:

"No person shall...be deprived of life, liberty, or property, without due process of law;..."

2. A portion of the Fourteenth Amendment to the Constitution of the United States:

"No state shall...deprive any person of life, liberty, or property without due process of law;... nor deny... equal protection of the laws..."

3. The Ninth Amendment to the Constitution of the United States:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the People."

4. Article 78A, Section 15 of the Annotated Code of Maryland (1965 Replacement Volume):

"Any real or personal property of the State of Maryland...and any legal or equitable rights, interests, privileges or easements in, to, or over the same, may be sold leased, transferred, exchanged, granted, or otherwise disposed of, to any person, firm, corporation, or to the United States, or any agency thereof,...for consideration adequate in the opinion of the Board of Public Works,... . As used herein, the term 'real or personal property or any legal or equitable rights'...shall include the inland waters of the State and land under said waters, as well as the

land underneath the Atlantic Ocean for a distance of three miles...”

5. Article 5 of the Declaration of Rights of the Constitution of Maryland:

“Art. 5. That the inhabitants of Maryland are entitled to the Common Law of England,...and to benefit of such of the English Statutes as existed on the Fourth day of July, 1776;...and have been introduced, used, and practiced by the Courts of Law or Equity;...subject, nevertheless, to the revision of, amendment or repeal by, the Legislature, of this State. And, the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by His Majesty Charles I to *Caecilius Calvert, Baron of Baltimore.*”

STATEMENT OF THE CASE

In 1969, Maryland's Board of Public Works, consisting of the Governor and two appointees, “sold” to James B. Caine, Inc. a real estate speculator and developer, certain estuarial marshes near Ocean City, Maryland, at a very minimal price, which lands were to then be filled and resold privately to such of the public as might be interested in having dry land premises near the seaside resort of Ocean City, Maryland. Clearly, as was alleged in the Complaint, the developers stood fair to gain many millions of dollars in profit.

The Complaint further alleged, and since the matter was decided by Demurrer, it is for purposes of the case, by law assumed to be true, that these were lands, which in the words of the Complaint:

“Were peculiarly adapted to the production of certain important forms of marine life, and constitut(ed) an important link in the food chain of many economically valuable wild species of fish, animal and bird life, which abound in Maryland, and upon her waters, and which are owned in common, and used by all of the members of the class on whose behalf this suit is brought...

“Said lands...are intended to be, and are being, filled in and built up, by those to whom they were conveyed, and their character as wetlands and marshlands is being completely obliterated, with the

consequent destruction of support to said fish and animal species aforesaid...

"(The) monetary consideration paid to Maryland was, in each case, so completely and totally inadequate...as to amount to a conveyance of the land by the...Board of Public Works, fraudulently, or by mistake, or by undue influence exerted upon it...

"The consideration for the said conveyances was also totally inadequate and insufficient, considering the ecological consequences of the sale, and the direct consequent effect upon the natural resources of the State of Maryland, which are owned by the Complainant and all others similarly situated, and which are held in trust for her and the class which she represents in the within suit by the State of Maryland and its public officials, including the Defendant Board...

"The lands sold to Maryland Marine Properties, Inc.. were worth two hundred times as much in fair market monetary value (as the consideration recieved); the lands conveyed to James B. Caine, Inc., were worth approximately five hundred times as much in fair market monetary value as the monetary consideration received by the Defendant Board...

"The Complaint , and all others similarly situated, will be irreparably injured and damaged, and have been so, by the said conveyances...in that valuable property, which is ecologically irreplaceable, (and which is) owned by them, or held in trust for them, by the Defendant Board of Public Works, has been disposed of and closed off to the wild natural resource cycle, which it was a most essential, irreplaceable part of...(and the tax return from said filled lands will be) a totally inadequate contribution by new owners of said lands, into the State Treasury...and...will never compensats for the deprivation of said lands, and the irreparable damage and injury which will be caused to the natural products and natural resources of the State of Maryland by the ecological disruption caused by the filling and loss of said wetlands and , marshlands.

which disruption may reasonably be expected to cause, or substantially contribute to, natural resource and wild life losses of many millions of dollars measured in financial terms alone...

"The Defendant corporations are proceeding with great speed to fill in and eradicate as marshlands and wetlands, the lands in question..."

The Complaint seeks a Mandatory Injunction, requiring reconveyance of the properties to the State, and a Declaratory Judgment by the Court that the "Deeds of Conveyance or mesne Deeds of Conveyance made by the Board of Public Works...(are) null, void, and of no effect, and that title remains in the People of Maryland."

In the Petitioner's "Memorandum of Law" filed early in the case in court of first instance, the lengthy argument of the Petitioner concluded with a section entitled "Constitutional Arguments" (See Certified Record, Page 13 of "Plaintiff's Memorandum of Law"), in which it was stated that the State, "has denied to the Plaintiff and the class she represents, rights, privileges and immunities protected by the 5th, 9th, and 14th Amendments of (sic) the Constitution of the United States."

The Petitioner, in her "Supplementary Plaintiff's Memorandum of Law", adopted entire the theory set forth in the case of *Commonwealth of Virginia vs. City of Newport News* (1932), 164 S.E. 689, at 696, which took the position that a state cannot divest itself, by legislative enactment, of the "inseparable incidents of sovereignty," and the "*jus publicum* and all rights of the people which are by their nature inherent or inseparable incidents thereof, are incidents of the overignty of the State. Therefore, by reason of the objects of purposes for which it was ordained, the Constitution impliedly denies to the Legislature the power to relinquish, surrender, or destroy, or substantially impair the *jus publicum*, or the rights of the people which are so grounded therein as to be inherent and inseparable incidents thereof..." This is clearly a (federal) Ninth Amendment argument.

Is Nisi Prius Court certainly had knowledge of the existence of this Supplementary Memorandum, for it is referred to by the Court in its Opinion (See Page11 AAppendix), but the Court below never met this argument, nor treated of it in any way.

The Court of Appeals of Maryland also did not deign to pass on any of these questions, and based its affirmance entirely on the, it is to be hoped, startling finding that a citizen has no right to sue, no "standing" to sue, where her entire environment is threatened; but she must instead, in order to receive the benefits of consideration of her case by the Maryland Court of Appeals, be somehow *out-of-pocket* \$3.00 worth, or a hundred dollars worth, or whatever the current dollar jurisdiction of the general jurisdiction civil courts may be. At page 4, Appendix, the Maryland Court states:

"As we have indicated, we find the threshold question of the standing of Mrs. Kerpelman to sue to be the determining issue in the appeal, and, inasmuch as we are of the opinion that she has alleged *no facts* which entitle her to sue, we shall affirm the Chancellor's Order of August 31, 1970, for this reason rather than for the reasons considered in the Chancellor's opinion about which we express no opinion..." (Emph. Supp.)

And at page 5, Appendix:

"In Maryland taxpayers have standing to challenge the constitutionality of a statute when the statute as applied increases their taxes, but if they cannot show a pecuniary loss or that the statute results in increased taxes to them, they have no standing to make such a challenge."

"...When the allegations of the Bill of Complaint are considered, it appears that the challenged transactions have—or will—result in the placing of *additional land on the tax rolls...*" (Emph. Supp.)

And at page 5, Appendix:

"(This) will *increase* the tax base of the state, so that the State taxes paid by Mrs. Kerpelman will actually *be reduced* as a result of those transactions." (Emphasis—the Court's!)

The Court also Stated, at page 4A

"There are general allegations that the conveyances will have a damaging effect upon the marine ecology of the State, but there are no allegations of fact which would support these general allegations, and, in any event, there are no allegations which indicate

how this will result in the payment of higher taxes by Mrs. Kerpelman.

"The allegations of the bill of complaint rather indicate that Mrs. Kerpelman is concerned with the policy of the State of Maryland in regard to the preservation of the marshlands and wetlands,¹ and opposes the policy existing when the bill of complaint was filed."

"Her interest in this aspect of the matter, however, is not alleged to be different from that generally of citizens of the State; and this Court has held that there must be allegations (and ultimate proof) of a special interest, different from the general interest of a member of the public, in the Plaintiff to enable a Plaintiff to challenge a statute or the action of public officials acting under a statute."

This point—the "standing" point—in the Opinion of the Maryland Court of Appeals is challenged, and Certiorari is requested to determine whether such an unseemly holding does not violate the Due Process clause of the Fifth Amendment, as applied to the states by the Fourteenth.

ARGUMENT

Reasons for Granting the Writ

To deny a citizen-claimant access to the courts when shee seeks to right a wrong visited upon the environment which she owns in common with other citizens, and which the State holds for her, in trust, is

1. At this point the Court in a footnote states that the General Assembly of Maryland, by Ch. 241 Laws of 1970, has effectuated substantial changes in the State's policy in this regard. This is vigorously disputed by the Petitioner. This allegation by *dictum* by the Court is neither supported nor unsupported by anything in the Record of this case, but by way of argument, the Petitioner emphatically contends that Maryland's "Wetlands Preservation Law" has been no more successfully administered to preserve wetlands, not can it be, than have various "Land Reclamation Laws" succeeded in reclaiming strip mined lands, as is believed to be well known to this court.

to deny her the Due Process and "Equal Protection" guaranteed by the Fourteenth Amendment, and the Maryland Court's holding that she does not have an interest measurable in enough jurisdictional dollars should be rejected by this Court if any of us are to survive much more than another decade in an environment rapidly becoming irreversibly fouled.

I. Due Process Was Denied

For the State of Maryland, through its court system, to deny the recognition of the Common Law of England, which is a clear part of the body of the law of Maryland, and which was explicitly adopted as a part of the law of Maryland by Maryland's Constitution, is to deny to the Petitioner Due Process; or, alternatively, where the law of Maryland declares that title to submerged lands which are part of the *jus publicum*, and are held in trust for purposes of navigation and piscary (and now for other ecological trust purposes), that alienation of such lands by the State-Trustee, to a real estate developer who will destroy their character as part of the *jus publicum*, is an alienation of a portion of the State's sovereignty, and such cannot be done by the State without sanction by constitutional amendment by the People as set forth in *Commonwealth v Newport News, supra*; such alienation having been permitted in this case, there was a denial to the Petitioner of Due Process or Equal Protection under the Fifth and Fourteenth Amendments, and/or an infringement of rights retained by the People under the Ninth Amendment, which denials by a state are, and should be, remediable by this court.

II. Citizen-Plaintiffs in Environmental Cases Are in Need of Assistance from This Court in Rectifying Environmental Damage Frequently Abetted by Uncaring State Appellate Courts which Seem Strangely Sympathetic with Environmental Rapists

It has been many years since this Court undertook to review the environmental issues presented in the instant case; the Petitioner's principle cases were both decided around the turn of the century—they are, *Shively vs. Bowlby*, 14 S.Ct. 548, 152 U.S. 1 (1899), and *Illinois Central Railroad Company vs. Illinois*,

146 U.S. 1018, as cited in her substantive Brief below.

The Petitioner's principle substantive argument is that the *jus publicum* is inalienable.

The Petitioner's principle substantive argument is based on the case of *Commonwealth of Virginia vs. City of Newport News* (1932), 164 S.E. 689, at 696.

The theory of that case is as follows, quoting from the case:

"Insofar as the sovereignty and the governmental powers of the state are concerned, the object of the ordination of the Constitution is to provide for the exercise thereof and not the abdication thereof. It would therefore be a perversion of the Constitution to construe it as authorizing or permitting the Legislature or any other governmental agency to relinquish, alienate, or destroy, or substantially impair the sovereignty, or the sovereign rights, or governmental powers of the state. The police power, the power of right of eminent domain, and the power to make, alter and repeal laws are all attributes or inherent and inseparable incidents of sovereignty and the power to govern. For this reason, although no express provision may be found in a State Constitution forbidding the Legislature to surrender, alienate, abridge, or destroy these powers, there is always such a limitation to be implied from the object and purpose for which the Constitution was ordained. Of course, such sovereign powers must be exercised subject to such limitations upon exercise thereof by the Legislature as are provided in the Constitution.

"When we come to consider the powers of the state Legislature under the Constitution with reference to the *public domain*, it is necessary to take cognizance of the two different basic rights which the state has over and in the public domain.

"As sovereign, the state has the right of jurisdiction and dominion for governmental purposes over all the lands and waters within its territorial limits, including tidal waters and their bottoms. For brevity this right is sometimes termed the *jus publicum*. But it also has, as proprietor, the right of

private property in all the lands and waters within its territorial limits (including tidal waters and their bottoms) of which neither it nor the sovereign state to whose rights it has succeeded has divested itself. This right of private property is termed the *jus privatum*. *Farnum on Waters and Water Rights*, S. 10, S. 36a; *Gough vs. Bell*, 21 N.J. Law, 156; *City of Oakland vs. Oakland, etc. Co.*, 118 Cal. 160, 50 P.277.

"The jus publicum and all rights of the people, which are by their nature inherent or inseparable incidents thereof, are incidents of the sovereignty of the state. Therefore, by reason of the objects of purposes for which it was ordained, the Constitution impliedly denies to the Legislature the power to relinquish, surrender, or destroy, or substantially impair the jus publicum, or the rights of the people which are so grounded therein as to be inherent and inseparable incidents thereof, except to the extent that the State or Federal Constitution may plainly authorize it to do so. Farnham on Waters and Water Rights, S. 10, S. 36a; Illinois Cent. R. Co. vs. Illinois, 146 U.S. 387, 455, 13 S.Ct. 110, 36 L.Ed.1018; Gough vs. Bell, 21 N.J. Law, 156. See, also, Greenleaf's edition of Cruise on Real Property, vol. 2 p. 67, note.

"On the other hand, the power of disposition is of the very essence of the proprietary right of the state, its jus privatum. Therefore no implication against the exercise by the Legislature of the power or right to alienate and dispose of the lands and waters of the state can arise from the object and purpose, for which the Constitution was ordained, except such as arises from the existence and inalienability of the jus publicum.

"From this, however, necessarily arises this limitation. The Legislature may not by the transfer, in whole or in part, of the proprietary rights of the State in its lands and waters relinquish, surrender, alienate, destroy, or substantially impair the exercise of the jus publicum. Or, to state it differently, the

Legislature may not make a grant of a proprietary right in or authorize, or permit the use of, the public domain, including the tidal waters and their bottoms, except subject to the jus publicum...

"See also *Illinois Cent. R. Co. vs. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed.1018.

Emphasis has been supplied throughout.

Larmar Corporation, v. State of Maryland, Chancery No. 8935, later appealed to the Court of Appeals of Maryland, with Opinion rendered May 10, 1971, ---Md. ----, ----A2d.

It is of note that although the Maryland Court of Appeals denied that the Petitioner had standing, yet in the Larmar case, referred to by Judge Prettyman (decided May 10, 1971, ---Md. ---, ---A2d ---), the Petitioner had sought to intervene and contended by way of Affidavit that she believed the Larmar suit was a collusive and sham suit. This proffer was rejected outright, and the Attorney General of Maryland accorded full standing to conduct the litigation which the Petitioner contended was fraudulent. Not being allowed to intervene as a party, she was unable to substantiate the rather clearly inferrable situation of collusion by use of Discovery procedured.

The hospitality the Maryland Court is apparently ready to concede its citizens is something less than it appears ready to accord real estate development corporations and public officials.

III A Constitutional Amendment Would be Necessary to Alienate These Lands

Rights Held *jus privatum* then (see above), are alienable, but rights *jus publicum* are part of the sovereignty given over by the people to the state. They cannot be altered by statue, as the Legislature has no right to impair the sovereignty or sovereign rights. Rights of navigation are immemorially included. So, we contend, are rights "environmental" in nature. In either case, submerged lands could not be relinquished, except by Constitutional Amendment by the people.

IV This Case May Be One Appropriate For Relief to be Granted Under the Ninth Amendment

Small and Jayson, in "The Constitution of the United States of America" (1964), are able to devote but a sparse half page to the Ninth Amendment, titled "Rights Retained by the People".

After quoting the Ninth Amendment "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.", the Editors state:

"The only right which the Supreme Court has explicitly acknowledged as being protected by this amendment is the right to engage in political activity. That recognition was accorded by way of *dictum* in *United Public Workers vs. Mitchell*, where the powers of Congress to restrict the political activities of federal employees was sustained..." (The case is cited as 330 U.S. 75, 94 (1947.) *Tennessee Power Company vs. T.V.A.*, 306 U.S. 118, 143, 144 (1939).; and *Ashwander vs. Tennessee Valley Authority*, 297 U.S. 288, 330, 331 (1936), as well as two apparently concurring opinions, Justice Chase, in *Caulder vs. Bowl* 3 Dall. 386, 388 (1798), and in *Loan Association vs. Topeka*, 20 Wall 655, 662-663 (1874), are cited to show rejection of Ninth Amendment arguments previously by this Court.

It is respectfully suggested that the Court may once again wish to give consideration, as has been intimated frequently of late by conservationists, to the use of the Ninth Amendment, which may be perhaps peculiarly apt for the protection of environmental rights.

V. *Illinois Central v. Illinois* 146US387

In *Illinois Central Railroad Co. vs. Illinois*, *supra* the Court said, at page 1040:

"We shall hereafter consider what rights the company acquired as a riparian owner from its acquisition of title to lands on the shore of the lake,...

"We proceed to consider the claim of the railroad company to the ownership of submerged lands in the harbor, and the right to construct such wharves, piers, docks and other works therein as it may deem

proper for its interest in it's business. The claim is founded upon the third section of the act of the Legislature of this State passed on the 16th of April, 1869, the material part of which is as follows:

"Section 3. (The Illinois Central Railroad Co. is given)...all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater...(and these)...are hereby granted in fee to said Illinois Central Railroad Company, its successors and assigns."

'The questions presented relate to the validity of the sections cited of the act... '...As to the grant of the submerged lands, the act declared that all the right and title of the State in and to the submerged lands constituting the bed of Lake Michigan,...

are granted in fee to the railroad company, its successors and assigns".

"This clause is treated by the counsel of the company as an absolute conveyance...as if they were uplands, in no respect covered by navigable waters, and not as a license to use the lands subject to revocation by the state. Treating it as such a conveyance, its validity must be determined by the consideration whether the Legislature was competent to make a grant of this kind...

"The question...is whether the Legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters;...

That the state holds title to the lands under the navigable waters of Lake Michigan within its limits, in the same manner that the state holds title to soils under tide water, by the Common Law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are opened to pre-emption and sale. *It is a title held in*

trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, free from the obstruction or interference of private parties.

"The interest of the people in the navigation of the waters, and the commerce over them, may be improved in these instances by the erection of wharves, docks, and piers therein, for which purposes, no valid objections can be made to the grants...And grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistent with the trust to the public upon which such lands are held by the state...The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of property. The control of the state for the purposes of the trust can *never* be lost,..."

Thus the Maryland statute, by the test of *this* case, is unconstitutional, in allowing the Board of Public Works to dispose of any lands simply for a consideration which it deems to be adequate, when the test must be, under the dictates of this case, whether the alienation will produce any substantial impairment of the public interest in the lands and waters remaining, regardless of the consideration.

Continuing in, *Illinois Central vs. Illinois*, at page 1043:

"The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of navigation, and use of the waters, parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the

preservation of the peace... So with trusts connected with public property, or property of a special character like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state...

"The idea that its Legislature can deprive the state of control over its bed and place the same in the hands of a private corporation created for a different purpose and limit it to transportation of passengers and freight between distant points and the city is a proposition that cannot be defended."

And quoting Chief Justice Taney, the Court went on to say:

"The sovereign power itself, therefore cannot consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which could never be long borne by a free people.

Many other cases might be cited wherein it has been decided that the bed or soil of navigable waters is held by the people of the state in their character as sovereign in trust for the public uses for which they are adapted. *Martin vs. Waddell* 41 U.S. 16... (Other citations)."

Then the Court went on to speak of the *jus privatum* and *jus publicum*.

All of the above, the Worcester County Court dismissed with the statement that..."Unless the law in force in the State of Maryland in which the Appellate decision has been rendered is identical with that in Maryland, the decision of the foreign jurisdiction, or the interpretation of a federal tribunal based upon the law of that foreign jurisdiction is neither persuasive nor controlling."

Not Persuasive? Obviously not in Worcester County; controlling—well does the Supreme Court control in Worcester County? Some think not, some think yes. Some love anarchy, especially in the innocent guise of "conservatism", and so seems the Honorable Court below.

Then after dispensing thus of Supreme Court holdings, the Worcester County Court states that:

"The individual states inherited the sovereignty over lands under navigable waters within the state, and granted unto them (sic) control and regulation of riparian rights, which the states were free to alienate..."

**VI. "Riparian Rights"
In Worcester County**

The Court assumed that "riparian rights" means the right to do everything, including dredging, filling, swiping all the oysters, building a housing development all the way to the other shore, or paving over the whole bay.

The most fundamental perusal of Black's Law Dictionary, or of *Shively vs. Bowlby, infra*, will indicate, however, that "riparian rights" is a very exact and fixed term, which does not include any of these things, and includes very little more, if anything, than the right to "wharf out" to the deep portion of the stream, and to have continued access at all times to the navigable waters in front of the owner's property. See also *Illinois Central Railroad* on riparian rights.

This new and modern transmutation of that phrase into absolute control is a thought fond to the hearts of developers and Maryland Eastern Shoremen, perhaps but is not in accord with the state of the law now nor ever.

CONCLUSION

Wherefore, the Petitioner prays a Writ of Certiorari be issued to the Court of Appeals of Maryland, that the Court may consider reversing the judgements of the Circuit Court for Worcester County, and of the Court of Appeals.

Respectfully submitted,

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IN THE COURT OF APPEALS OF MARYLAND

No. 364

September Term, 1970

ELINOR H. KERPELMAN

v.

**BOARD OF PUBLIC WORKS OF MARYLAND
et al.**

**Barnes
McWilliams
Finan
Snigley
Smith,**

JJ.

Opinion by Barnes, J.

Filed: April 12, 1971

In this appeal from the Order of the Circuit Court for Worcester County (Prettyman, J.) dated August 31, 1970, sustaining the demurrers of two of the appellees, Maryland Marine Properties, Inc. (Maryland Marine) and the Board of Public Works (Board), without leave to amend, to the bill of complaint filed by the appellant, Mrs. Elinor H. Kerpelman, the decisive question is whether or not Mrs. Kerpelman had standing to sue. Having concluded that she does not have such standing, we do not reach the other interesting questions of the constitutionality of Code (1965 Repl. Vol.), Art. 78A, 15 (the Statute, and of the propriety of the actions of the Board under that statutory provision and laches.

Mrs. Kerpelman's bill of complaint, filed on September 30, 1969, alleged in paragraph 1 that she "is a taxpayer of the State of Maryland, and a resident thereof, in Baltimore City; this suit is brought on her own behalf, and on behalf of all others similarly situated." She then alleges in paragraph 2 that the Board is given authority by the Statute to dispose of lands of the State of Maryland by sale or otherwise, provided that this is done for "a consideration adequate in the opinion of the Board..." Also, by Art. 6 of the Declaration of Rights of the Maryland Constitution, the members of the Board, individually are " 'Trustees of the Public' " in all that they do and must reasonably exercise this fiduciary duty, particularly in regard to their stewardship of property.

It is then alleged in paragraph 3 that in 1968 contrary to the Art. 6 Trusteeship, and without the necessary opinion as to adequacy, the Board—then composed in part of different

1. The Cancellor passed an order on September 22, 1970, sustaining the demurrer of James B. Caine, Inc., without leave to amend, for the same reasons assigned in its opinion and order of August 31, 1970; but the order for appeal was not filed until October 26, 1970, or more than the 30-day period provided for appeal under Maryland Rule 812. The defendant and appellee, James B. Caine, Inc., moved to dismiss this appeal pursuant to Rule 835 b (3); and this court dismissed this appeal on November 16, 1970.

membership—but being the same constitutional and statutory Board as the present Board, conveyed 190 acres of land then the property of the people of Maryland to the defendant and appellee, Maryland Marine Properties, Inc., 197 acres of Maryland lands, or did so by mesne conveyances “both for a totally inadequate and insufficient consideration, compared with the fair market value or intrinsic value of the said lands, and the said Board then had no opinion upon the monetary adequacy of the consideration proffered, or had a mistaken, unreasonable, or totally false opinion of such adequacy,” so that the conveyances were illegal and void for failure to comply with the precondition set forth as to adequacy in the Statute and as a violation of the Art. 6 Trusteeship. It is also alleged in paragraph 3 that the consideration for the conveyances was also totally inadequate and insufficient considering “the ecological consequences of the sale, and the direct consequent effect upon the natural resources of the State of Maryland, which are owned” by Mrs. Kerpelman and all others similarly situated and which are held in trust for her and the class she represents in the suit, by the State of Maryland and its public officials including the Board.

The lands mentioned in paragraph 3 are described in paragraph 4 as situate in Worcester County and are marshlands and wetlands, *i. e.*,

marshes and shallows, peculiarly adapted to the production of certain important forms of marine life and constituting an important link in the food chain of many economically valuable wild species of fish, animal and bird life, which abound in Maryland and upon the waters of the State, “which are owned in common, and used by all of the members of the class on whose behalf this suit is brought.” These marshlands and wetlands are being filled in and built up by those to whom they were conveyed, it is alleged in paragraph 5, so that their character as such lands is being completely obliterated with the consequent destruction of fish and animal species already mentioned.

In paragraph 6, it is alleged that the lands conveyed to Maryland Marine were sold by an exchange for other marshlands

and wetlands which are "cumulatively only one-half as productive of the important species of marine life and products as those which were conveyed" to Maryland Marine. The land thus exchanged was worth only \$41,000.00 while the lands conveyed to Maryland Marine "were worth two hundred times as much in fair market monetary value." The lands sold to James B. Caine, Inc. were alleged to have been sold to it for the "completely and totally inadequate money consideration" of \$100.00 an acre and such lands were worth approximately 500 times as much in fair market value as the monetary consideration received by the Board. The monetary consideration, it was alleged in paragraph 7, was, in each case, "so completely and totally inadequate as was known to all parties at that time as to amount to a conveyance of the land by the Defendant Board of Public Works fraudulantly, or by mistake, or by undue influence exerted upon it."

In paragraph 8, it was alleged that Mrs. Kerpelman, the plaintiff, and "all others similarly situated" will be and have been irreparably injured and damaged by the two conveyances mentioned "in that valuable property, which is ecologically irreplaceable, owned by them or held in trust for them" by the Board, has been disposed of and closed off to the wild natural resource cycle of which it was a "most essential, irreplaceable part." The plaintiff and all others similarly situated are deprived of their use and benefit of these lands for "a totally inadequate contribution by new owners of the said lands into the state treasury by way of real estate taxes paid and to be paid, the value of which taxes will never compensate for the deprivation of said lands and the irreparable damage and injury which will be caused to the natural products and natural resources of the State of Maryland by the ecological disruption caused by the filling and loss of said wetlands, marshlands and shallows; which disruption may reasonably be expected to cause or substantially contribute to, natural resource and wildlife losses of many millions of dollars measured in financial terms alone."

Paragraphs 9 and 10 allege that Maryland Marine and James B. Caine, Inc. are "Proceeding with great speed to fill in and

eradicate as marshlands and wetlands" the lands in question and that the plaintiff has no adequate remedy at law.

The prayers for relief are that:

1. The case be advanced for immediate trial and hearing on any motions filed.

2. A mandatory injunction be issued ~~requiring~~ Maryland Marine and James B. Caine, Inc. to reconvey to the State of Maryland the lands in question.

3. The Court declare that the conveyances of the lands in question be declared to be null, void and of no effect and that "title remains in the People of Maryland."

4. The plaintiff have other and further relief.

Maryland Marine filed a demurrer to the bill of complaint on October 20, 1969, alleging three grounds for demurrer:

1. No facts were alleged sufficient to constitute a cause of action or entitling the plaintiff to any of the relief prayed for in the bill of complaint.

2. The plaintiff failed to allege facts sufficient to establish her standing to sue in the case.

3. The plaintiff is barred by laches.

The Board, on October 21, 1969, also filed a demurrer stating in allegations 1 through 4 that no cause of action in equity was alleged entitling the plaintiff to the relief prayed for in the bill of complaint; that the Statute (set out in full) imposed no limitation upon the power of the Board to dispose of the property involved in the suit and the Board was authorized as a matter of law to dispose of that property.

5. There was no allegation that the alienation of State property was not "for a consideration adequate in the opinion" of the Board as provided in the Statute.

6. There were no allegations that the procedure used by the Board in connection with the disposition of the property was "improper, defective or in any manner contrary to law."

7. The exercise of the Board's discretion, if not exercised fraudulently or corruptly, is not subject to review by a court of equity.

After the submission of legal memoranda by counsel for the

parties and argument, the Chancellor, in a well-considered, written opinion concluded, *inter alia* that the demurrers should be sustained, without leave to amend, because the General Assembly had properly amended the common law by the Statute which gave the Board the power and discretion to make the conveyances in question and that the "strict trust theory" proposed by the plaintiff was not applicable. The Chancellor did not find it necessary to consider the standing of the plaintiff to sue.

As we have indicated, we find the threshold question of the standing of Mrs. Kerpelman to sue to be the determining issue in the appeal and, inasmuch as we are of the opinion that she has alleged no facts which entitle her to sue, we shall affirm the Chancellor's order of August 31, 1970, for this reason rather than for the other reasons considered in the Chancellor's opinion about which we express no opinion. Cf. *Citizens Committee v. County Commissioners*, 233 Md. 398, 197 A.2d 108 (1964).

Mrs Kerpelman first alleges her standing to sue as a taxpayer of the State of Maryland, residing in Baltimore City. There is no allegation that she is a taxpayer of Worcester County and, as a resident of Baltimore City, the inference would be that she was not a Worcester County taxpayer. Whatever interest she has in the subject matter as a taxpayer of the State generally is the interest which any other taxpayer of the State generally has in that subject matter. The property in question is located in Worcester County but Mrs. Kerpelman alleges no interest in that property as a local taxpayer.

In this type of situation, Judge McWilliams, for the Court, stated the applicable rule in regard to the standing of a taxpayer to sue in *Stovall v. Secretary of State*, 252 Md. 258, 263, 250 A.2d 107, (1969), as follows:

"In Maryland taxpayers have standing to challenge the constitutionality of a statute when the statute as applied increases their taxes, but if they cannot show a pecuniary loss or that the statute results in increased taxes to them, they have no standing to make such a challenge."

See also , *Murray v. Comptroller* 241 Md. 383, 391, 216 A.2d 897 (1966); *Citizens Committee v. County Commissioners*, 233 Md. 398, 197 A.2d 108 (1964); and *Baltimore v. Gill*, 31 Md. 375, 394 (1869).

When the allegations of the bill of complaint are considered, it appears that the challenged transactions have — or will — result in the placing of additional land on the tax rolls which will increase the tax base of the State so that the State taxes paid by Mrs. Kerpelman will actually *be reduced* as a result of those transactions. There are general allegations that the conveyances will have a damaging effect upon the marine ecology of the State, but there are no allegations of facts which would support these general allegations and, in any event, there are no allegations which indicate how this will result in the payment of higher State taxes by Mrs. Kerpelman.

The allegations of the bill of complaint rather indicate that Mrs. Kerpelman is concerned with the policy of the State of Maryland in regard to the preservation of the marshlands and wetlands, and opposes the policy existing when the bill of complaint was filed. Her interest in this aspect of the matter, however, is not alleged to be different from that generally of citizens of the State; and this Court has held that there must be allegations (and ultimate proof) of a special interest, different from the general interest of a member of the public, in the plaintiff to enable a plaintiff to challenge a statute or the action of public officials acting under a statute. *Houck v. Wachter*, 34 Md. 265, 6 Am.Rep. 332 (1871) which has been cited and followed in over twenty-five Maryland cases including *Bauernschmidt v. Standard Oil Co.*, 153 Md. 647, 138 A. 531 (1927) and most recently *Rogers v. Md. — Nat'l Cap. P. & P. Comm'n*, 253 Md. 687, 253 A.2d 713 (1969).

An analogous case to the present case is *Citizens Committee v. County Commissioners*, *supra*, in which persons opposed to the policy of the State in regard to slot machines in Anne Arundel County sought, as taxpayers, to challenge the validity of the Maryland Statutes and Anne Arundel County Ordinances permitting the licensing of slot machines. There were allegations

of general injury to the State from the operation of these gaming devices; but we held that, inasmuch as the allegations and proof indicated that the revenue derived by the County from such licensing *decrease* the County tax rate and the taxes payable by the plaintiffs in the *Citizens Committee* case, the plaintiffs, as taxpayers, had no standing to sue and that, as members of the public, they had no standing to sue because their alleged injury was no different from that suffered generally by the public, and there must be an allegation and ultimate proof of *special injury* to establish standing to sue.

The instant case is to be distinguished from our decision in *Thomas v. Howard County, Maryland, Md.*, A.2d (1971) [No. 353, September Term, 1970, decided April 12, 1971] in which the allegations of the bill of complaint were sufficient to establish, *prima facie*, injury to the plaintiffs as taxpayers and there were no allegations on the face of the bill of complaint indicating that the challenged action resulted in a *decrease*, but that it *increased* the taxes payable by the plaintiffs.

Mrs. Kerpelman, secondly, in paragraphs 2 and 3 of the bill of complaint seeks to establish her standing to sue upon the novel theory that she, as a member of the public of Maryland, is a beneficiary of a "public trust" flowing from Art. 6 of the Declaration of Rights of the Maryland Constitution stating that persons invested with the legislative or executive powers of government "are Trustees of the Public, and, as such, accountable for their conduct...."

Article 6 is hortatory in nature — see *Bernstein v. Board of Education of Prince George's County*, 245 Md. 264, 226 A.2d 243, 248 (1967) — and sets forth the well-established doctrine that the duties of public officials are fiduciary in character and are to be exercised as a public trust. The lands in Maryland covered by water were granted to the Lord Proprietor by Section 4 of the Charter from King Charles I to Caecillius Calvert, Baron of Baltimore, his heirs, successors and assigns, who had the power to dispose of such lands, subject to the public rights of fishing and navigation. *Brown v. Kennedy*, 5 H. & J. 195 (1821). By virtue of Art. 5 of the Declaration of Rights in the Maryland Constitution, the inhabitants of Maryland become entitled to all

property derived from and under the Charter and thereafter the State of Maryland had the same title to, and rights in, such lands under water as the Lord Proprietor had previously held. These lands were held by the State for the benefit of the inhabitants of Maryland and this holding is of a general fiduciary character. Art. 6 of the Declaration of Rights, however, does not purport to change, modify or enlarge the nature of this holding by the State to by the State or to give to a citizen of Maryland any different status to challenge a statute or the activities of public officials acting under a statute that exists in regard to any other matters of State concern. No decision of this Court is cited to sustain the construction of Art. 6 urged upon us by Mrs. Kerpelman and we know of no such decision. In our opinion, it would be an unwarranted departure from our decisions and those of our predecessors, already mentioned, on the subject of standing to challenge the constitutionality or application of a statute, to adopt the construction of Art. 6 urged upon us by the appellant. Her remedy, as a member of the general public without suffering injury as a taxpayer or having a special interest in the subject matter, lies with the legislative branch of the government and not with the courts.

**ORDER OF AUGUST 31, 1970, AFFIRMED,
THE APPELLANT TO PAY THE COSTS.**

OPINION AND ORDER OF COURT [AUG. 31, 1970]

This is another one of those cases in which rulings required upon pleadings now before the Court for determination can obscure the principal issue presented to the Court at the time of the Hearing on the pleadings on May 11, 1970.

On September 30, 1969, the Complainant filed a "Bill of Complaint For A Mandatory Injunction, And For Declaratory Relief". Upon the reading of the Bill, however, and the prayers for relief, it becomes apparent that the complaint does not actually state a typical cause of action as usually embraced in a petition for a declaratory decree or declaratory judgment. In other words, the Bill does not actually seek a declaration of rights of the parties, but seeks the specific relief as requested in the said prayers, the contents of which follow:

"WHEREFORE, the Complainant prays:

- (a) That this case be advanced on the Court Docket for immediate trial, and hearing on any Motions which may be filed.
- (b) That a Mandatory Injunction may issue, requiring the Defendants, Maryland Marine Properties, Inc., and James B. Caine, Inc., to reconvey to The State of Maryland those lands in Worcester County which are the subject of the within suit.
- (c) That the Court declare the Deeds of Conveyance or Mesne Deeds of Conveyance made by the Board of Public Works of Maryland of lands in Worcester County, Maryland, unto Maryland Marine Properties, Inc., and James B. Caine, Inc., which conveyances were made in 1968, of 197 acres and 190 acres, respectively, more or less, to be null, void, and of no effect, and that title remains in the People of Maryland."

To this Bill of Complaint, the Defendant Maryland Marine Properties, Inc. filed its Demurrer on October 20, 1969, together with an extensive memorandum raising three

specific issues; namely, (1) a failure to allege sufficient facts to constitute a cause of action, (2) attacking the standing to sue of the Plaintiff, and (3) raising the question of laches. On October 21, 1969, the Defendant Board of Public Works filed its Demurrer citing the provisions of Section 15 of Article 78A of The Annotated Code of Maryland, and the authority of the Board of Public Works of Maryland as therein set forth, contending that, in the absence of any allegation of fraud or the facts supporting such an allegation, no cause of action was sufficiently stated to subject the actions of the Board of Public Works to the scrutiny of a Court of Equity.

On October 21, 1969, James B. Caine, Inc., one of the Defendants, filed a "Motion Raising Preliminary Objection", alleging the lack of jurisdiction of this Court over the subject matter of the Bill, on the grounds that a determination involved a "political question", and "not a justiciable question".

On November 6, 1969, the Complainant filed a "Reply To 'Memorandum of Law of Maryland Marine In Support of Demurrer'".

On November 7, 1969, the Complainant filed a "Motion Ne Recipiatur To Demurrer Of Maryland Marine", based upon contention that the Demurrer raised a question of laches which should be considered as a factual defense rather than a subject of a demurrer.

On November 17, 1969, the Complainant filed an "Answer To Motion Raising Preliminary Objection", denying the nature of the question to be "political", and summarizing the contentions of the Bill as being (a) that the Board of Public Works enjoyed no alienable title to the lands in question, (b) that "[t]he conveyance was for such a completely and totally inadequate consideration, that the Board of Public Works could not have had a bona fide opinion that the consideration was adequate, and therefore fraud is inferred by the Complainant".

On January 26, 1970, an organization allegedly known as "North American Habitat Preservation Society" filed a

“Petition To Intervene As Plaintiffs”, upon which the Court issued a Show Cause Order to the Defendants ordering them to show cause on or before February 16, 1970, if any they had, why the said Petition to Intervene should not be granted. The Defendant Maryland Marine Properties, Inc., filed its Answer to the Petition to Intervene, on February 24, 1970, alleging insufficient facts to establish the standing of the Petitioners to sue. On February 27, 1970, the Defendant, James B. Caine, Inc., filed a “Motion Ne Recipiatur As To Petition To Intervene As Plaintiffs”, alleging the non-receipt of a copy of the said Petition, the existence of which the attorney for the said Defendant allegedly accidentally discovered in the office of the Clerk of this Court, on February 24, 1970.

On March 11, 1970, the Complainant filed a “Motion Ne Recipiatur” to the Motion Ne Recipiatur of the Defendant James B. Caine, Inc., founded upon the grounds that the Caine Motion was based upon “facts not apparent from the face of the record, and yet was not under affidavit”. Interestingly enough, no copy of the Complainant’s Motion Ne Recipiatur was apparently served upon the Defendant James B. Caine, Inc., or any of his attorneys until May 13, 1970, after which an amended certificate of mailing was apparently intended to be filed by the attorney for the Complainant on March 16, 1970.

On May 5, 1970, the Plaintiff filed a Memorandum of Law, the main body of which was a photo-copy of a memorandum filed, on September 15, 1969 in a similar case in the Circuit Court for Baltimore City.

On May 6, 1970, the Defendant James B. Caine, Inc., filed a “Memorandum In Support Of Preliminary Objection”, the main body of which was a photo-copy of a brief filed in the same similar case in the Circuit Court for Baltimore City.

On May 11, 1970, the Complainant filed a “Motion For Summary Judgment Upon Some Issues”, alleging “no dispute as to any material fact concerning the following issues”; namely, (a) [t]hat she is a taxpayer of the State of Maryland, (b) [t]hat she is a resident thereof in Balti-

more City, and (c) [t]hat this suit is brought on her own behalf, and on behalf of all others similarly situated.”

The Hearing was held on May 11, 1970 on all Demurrers, Motions, Petitions, etc., consistent with the notice of the assignment thereof mailed to all parties on April 8, 1970.

On May 15, 1970, the Complainant filed as “Answer To Memorandum Of Law Of Defendant James B. Caine, Inc.”, in which the Complainant suggested that “counsel has missed the point”, because of the contention of the Complainant that “nobody” has an alienable title to the lands in question.

On June 17, 1970, the Complainant filed a “Supplementary Plaintiff’s Memorandum Of Law”, in which the Complainant stated to the Court that she was adopting the entire theory set forth in the case of Commonwealth of Virginia vs. City of Newport News, 164 S.E. 689, at page 696, and quoted from that case the theory upon which she relied.

Petition to Intervene

The first duty of the Court is obviously to dispose of the Petition to Intervene filed on behalf of the “North American Habitat Preservation Society”, for whom Leonard J. Kerpelman, Esq. is “solicitor” as well as being the attorney for the Complainant. Based entirely upon the facts set forth in the said Petition as to the nature and composition of the said Society, and the interest which it has in this case, the Court has determined that it lacks standing to sue as a party Plaintiff, and therefore its Petition to Intervene would be denied. *Horace Mann League vs. Board*, 242 Md. 645, at page 652. *Citizens Committee vs. County Commissioners*, 233 Md. 398, *Bar Association vs. District Title Co.* 224 Md. 474, and *Greenbelt vs. Jaeger*, 237 Md. 456.

A certain R. Doyle Grabarck, Box 869, Adelphi, Maryland, 20783, has likewise joined as a Petitioner in the said Petition to Intervene, both as President of the said Society, and individually. As President of the Society, the Court would consider his capacity to sue to be co-existent with the Society, and of no greater magnitude. As an individual,

however, he is apparently in the same position as the Complainant, Elinor H. Kerpelman, and the determination as to her standing will likewise be determinative of the standing of Mr. Grabarek. It seems also to follow that a determination of the contentions and issues raised by the Complainant would likewise be determinative of the contentions and issues raised by Mr. Grabarek, particularly in view of the fact that each are represented by Mr. Kerpelman. Indeed, by paragraph 4 and 5 of the Petition to Intervene, the Petitioners have so stated, and have adopted the position of the Complainant. There is one major difference, however, between the Petitioner Grabarek and the Complainant Kerpelman. That difference is the fact that nowhere in the Petition to Intervene is it alleged that Mr. Grabarek is a taxpayer of the State of Maryland. The Petition to Intervene, therefore, by R. Doyle Grabarek, as an individual, will be, likewise, denied.

Motions Ne Recipiatur

The determination by the Court upon the Petition to Intervene, as hereinbefore set forth, makes unnecessary a consideration of the Motion Ne Recipiatur filed by the Defendant James B. Caine, Inc., or the Motion Ne Recipiatur filed by the Complainant to the Caine Motion Ne Recipiatur. It might be well for the Court to observe, however, that Counsel for the Complainant had due notice of the appearance of Lee W. Bolte, Esq., and the firm of Sanford and Bolte, on behalf of the Defendant James B. Caine, Inc., as early as October 21, 1969, upon the filing of the Caine Motion Raising Preliminary Objection. Mr. Kerpelman recognized this appearance in his service of November 4, 1969 of his "Reply", his Motion filed on November 7, 1969, and his Answer filed on November 17, 1969. He did ignore the appearance in his service of the said Petition to Intervene. The apparent failure of Counsel for Maryland Marine Properties, Inc., to receive a copy of the said Petition to Intervene is the fact that Mr. Kerpelman used an inadequate address therefor, according to his Certificate of Service, in that he omitted any reference to room numbers. The Clerk of this Court can hardly be held responsible for this

defect in view of the fact that in his undated Certificate of Service of the said Petition to Intervene, Mr. Kerpelman alleged service upon a certain "Joseph H. Young, Esq., 901 First National Bank Bldg., Baltimore, attorney for James B. Caine, Inc." The Clerk would have no way of knowing whether or not additional Counsel for the Caine Corporation was now in the case, and had simply failed to enter his appearance of record. Perhaps the Clerk, however, should be more careful, and require that the Certificate of Service by an attorney be dated, and that all attorneys of record be included within such Certificate.

Motion Raising Preliminary Objection

The Court should then next consider the preliminary objection raised by the Defendant James B. Caine, Inc., upon the question of whether or not the Bill of Complaint merely stated a political question, and not a justiciable issue. Granting that a reading of the Bill of Complaint would make it difficult to delineate a justiciable issue, and that the Bill appears to be more in the nature of a statement of a political position, requiring legislative attention or executive restraint, the memoranda subsequently filed on behalf of the Complainant have had the salutary effect of interpreting the meaning of the Bill of Complaint and articulating a position which presents a legal issue. In view of this subsequent elucidation, by counsel for the Complainant, the Court will entertain jurisdiction, and render a decision upon the issue as narrowly framed and presented to the Court by Complainant's Memoranda. The Motion of the Defendant James B. Caine, Inc., raising this preliminary objection will be overruled.

*Motion Ne Recipiatur of Complainant to
Demurrer of Maryland Marine
Properties, Inc.*

The Court will entertain the Demurrer of the Defendant Maryland Marine Properties, Inc., and deny the Motion Ne Recipiatur filed thereto by the Complainant. In his Motion Ne Recipiatur thereto, Counsel for the Complainant

has over simplified the law with regard to the inclusion of a charge of laches in a demurrer.

“The defense of limitations or laches may be raised on demurrer where, on the face of the bill, it can be seen that it is a bar. Although, ordinarily, the defense of laches must be made by answer alleging facts showing lapse of time and prejudice to the Defendant, as discussed supra §142, where the bill on its face shows both lapse of time and circumstances as suggest prejudice or acquiescence and call for explanation, the bill is demurrable.” 9 M. L. E. “Equity”, Section 152, and cases therein cited, including the 1969 Pocket Part.

The Court will concede that the question of whether or not a case of laches is presented within the four corners of the Bill of Complaint is indeed a close one, but if the question of laches was the only question before the Court for determination in this proceeding at this time, the Court would insist upon a Hearing to spread the facts upon the record, particularly as they relate to prejudice to the Defendant Maryland Marine Properties, Inc. The Court, therefore, would take the position that it would not sustain the Demurrer on that grounds alone, but defer it as a matter of defense. Such a position by the Court, however, does not dispose entirely of the matter now for determination. The fact that a demurrer contains an invalid, unsupported or otherwise irrelevant issue, or the fact that the grounds assigned do not meet the approval of counsel for the opposing party or the Court does not justify the rejection of the pleading in toto. Even if one of the grounds assigned in a demurrer is found to be lacking in legal efficacy, the remaining grounds, if any there be, survive and are entitled to the consideration of the Court. Such is the situation presented here.

Demurrers

The Court is well aware of, and has had several opportunities to apply, the position of the Court of Appeals of Maryland with regard to demurrers filed in opposition to petitions for declaratory relief. *Kelley vs. Davis*, 233 Md.

494. As mentioned early in this Opinion, however, this Court does not envision the Bill of Complaint in this case to state the grounds for, or the request for, a declaration of the rights of the parties. The declaration which the Complainant seeks is merely a declaration to support the issuance of the "Mandatory Injunction" which she prays. In other words, it would be necessary to "declare" invalid the conveyances referred to within the Bill and in prayer for relief "(c)" in order to grant the relief prayed in "(b)" of the prayers for relief. There is no basis for, or necessity for, any other, further, or fuller declaration of rights of the parties. The Court is, therefore, of the opinion that the rule against entertaining a demurrer to a petition for declaratory relief is not appropriate to this particular proceeding, and should not be applied hereto.

The Court will attempt to state the position of the Complainants insofar as it presents a legal issue to be resolved herein. The Complainant adopts the position that title to lands under tidal waters vested in the King of England, for the benefit of the nations, passed to the Colonies under the Royal Charters granted therefor, in trust for the communities to be established, and upon the American Revolution, passed to the original States to be held by the officials thereof in trust for the people within the boundaries of the respective States, subject only to the rights surrendered by the Constitution of the United States to the Federal Government for the regulation of navigation. The trust which she envisioned is one which covers the entire *jus publicum* and vests in the trustee an irrevocable and inalienable title to such property. In support of her position in regard to such a trust, she narrowly construes the first portion of Article 6 of the Declaration of Rights of the Constitution of Maryland, of 1867, which reads:

"Art. 6. That all persons invested with the Legislative or Executive powers of Government are the Trustees of the Public and, as such, accountable for their conduct: . . ."

She is further contending that such being the alleged common law of England, the General Assembly of Maryland, or apparently any Provincial legislature, is not, and

never has been, empowered or authorized to change or modify that common law. As authority for that provision, she cites a portion of the content of Article 5 of the Declaration of Rights of the Constitution of Maryland, of 1867, the portion which she cites being as follows:

“Art. 5. That the Inhabitants of Maryland are entitled to the Common Law of England, . . .”.

At this point, perhaps it would be well that the Court quote the remainder of Article 5 of the Declaration of Rights, with the emphasis by underlining being supplied by the Court:

“Art. 5. That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English Statutes as existed on the Fourth day of July, 1776; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, 1867; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; *subject, nevertheless, to the revision of, an amendment or repeal by, the Legislature, of this State.* And, the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by His Majesty Charles I to Caecilius Calvert, Baron of Baltimore.”

There is no substantial difference between that portion of the 1867 Constitution of Maryland and paragraph 3 of the Declaration of Rights of the First Constitution of Maryland, as reported by Kilty, Volume 1, The Laws of Maryland 1799 Edition. It reads as follows:

“III. That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by jury according to the course of that law, and to the benefit of such of the English statutes as existed at the time of their first emigration and which by experience have been found applicable to their local and other circumstances, and of such others as have been since

made in England or Great Britain, and have been introduced, used and practiced by the Courts of Law or Equity; and also to all acts of assembly in force on the first of June, 1774, except such as may have since expired, or have been, or may be altered by acts of convention, or this declaration of rights; *subject nevertheless to the revision of, and amendment or repeal by, the Legislature of this State*: and also the Inhabitants of Maryland are also entitled to all property derived to them from or under the charter granted by His Majesty Charles I to Caecilius Calvert, Baron of Baltimore.”

If, as Counsel for the Complainant has stated in his Supplementary Memorandum, the Court was impatient at the Hearing with the persistent argument of Counsel with regard to the elements of the Common Law doctrine, perhaps it was because of the clear exception in the Declaration of Rights as hereinbefore set forth, and the almost incontestable legal understanding that the Legislature of Maryland is at liberty, and in the conscientious performance of its duties, must, from time to time, change the Common Law through statutory enactments in order to meet the changing conditions of time and history. *Lutz vs. State* 167 Md. 12, *Heath vs. State*, 198 Md. 455, *Goldenberg vs. Federal Finance*, 150 Md. 298, 5 M.L.E. “Common Law”, Section 3. The adoption of any proposition that would abrogate, nullify and destroy the great body of law in Maryland, including enactments of the General Assembly, except so much thereof as interpreted and applied the Common Law of England prior to 1776 and the treatment of subjects not contemplated by that common law, is so illogical, unreasonable, and disastrous in its consequences as to be almost incomprehensible. The Court supposes that this is the reason why the point had not been more frequently pressed upon the Courts of this State in the past.

The Court is indebted, however, to Counsel for the Complainant for urging upon the Court the controlling nature of the opinion of the Supreme Court of the United States in *Shively vs. Bowlby*, 14 Sup. Ct. 548, 152 U. S. 1. The Court willingly and delightedly adopts the decision therein to be

determinative of the issues presented by the Complainant for resolution in this proceeding. Unfortunately, Counsel for the Complainant has misread the case, and has appropriated wording from that case, out of context, to attempt to support the position of the Complainant herein.

That case establishes the proposition that, consistent with the Common Law of England, the individual States inherited the sovereignty over lands under navigable waters within the State, and granted unto them control and regulation of riparian rights, which the States were free to alienate according to the constitution and statutes of the respective States. In a most helpful and extensive treatment of the entire subject matter of riparian rights as they existed within the original thirteen states, and as, by virtue of that opinion, extended to the new states admitted into the Union thereafter, the Supreme Court, in *Shively vs. Bowlby*, has furnished a source of history of the treatment of riparian rights of enormous magnitude, and through its study, one is oriented to the broad spectrum, and range of treatment, of the subject by the individual States. This concept is fundamental if one is to now attempt to define and understand riparian rights within the United States. Available treaties, encyclopedic compendiums, and conclusions based upon summaries of annotations must be read and considered in the light of the cardinal principle that the decisions of the individual states are based upon the law as it had been established within the individual states, and unless the law in force in the State in which the appellate decision has been rendered is identical with that in Maryland, the decision of the foreign jurisdiction, or the interpretation of a federal tribunal based upon the law of that foreign jurisdiction, is neither persuasive nor controlling.

If the strict trust theory proposed by the Complainant is the law in other jurisdictions, it is certainly not the law in Maryland. Without belaboring the issue with repetition of authorities recently enumerated and discussed by this Court in No. 8935 Chancery, the Court would merely observe that, beginning with the Acts of 1745 and continuing through the Acts of 1970, the Legislature of Maryland has recognized the existence of certain riparian rights in pri-

vate land owners. A long line of judicial decisions of the Court of Appeals of Maryland and Federal Courts interpreting Maryland Law, have protected, enforced, interpreted and arbitrated these rights, beginning, at least, in 1815, with *The Wharf Case*, reported in 3 Bland at page 361, and continuing through *Causey vs. Gray*, in 1968, reported in 250 Md. at page 380, and through November 12, 1969, in *Western Contracting Corporation vs. Titter*, reported in 255 Md. at page 581.

The most specific pronouncement of the General Assembly of Maryland, however, upon the narrow issue sought by the Complainant to be raised against The Board of Public Works of Maryland is contained in Section 15 of Article 78A of The Annotated Code of Maryland. Without quoting that lengthy section in full in this Opinion, since 1945, The Board of Public Works of Maryland has been granted specifically the following power:

“Any real or personal property of the State of Maryland or of any Board, Commission, Department or Agency thereof, and any legal or equitable rights, interests, privileges or easements, in, to, or over the same, may be sold, leased, transferred, exchanged, granted or otherwise disposed of to any person, firm, corporation, or to the United States, or any agency thereof, or to any Board, Commission, Department or other agency of the State of Maryland for a consideration adequate in the opinion of the Board of Public Works, or to any county or municipality in the State subject to such conditions as The Board of Public Works may impose . . . As used herein, the term ‘real or personal property or any legal or equitable rights, interests, privileges for easements in, to, or over the same’ shall include the inland waters of the State and land under said waters, as well as the land underneath the Atlantic Ocean for a distance of three miles from the low watermark of the coast of the State of Maryland bordering on said ocean, and the waters above said land . . .”

The language which Counsel for the Complainant has selected from *Shively vs. Bowlby* with regard to the imposi-

tion of a trust does not apply to the type of trust which the Complainant espouses. The factual situation in *Shively vs. Bowlby* presented the issue as to whether or not a purported grant from the United States of America, while the area was a territory under the jurisdiction of the Federal Government, took precedence over a grant by the State of Oregon for the same land. The Court determined that the United States had no power to make such a grant because the Federal Government held the land in trust pending the formation of the new State. If one will read the last ten paragraphs of the Opinion, the thrust of the entire opinion will become most evident. The type of trust referred to therein bears no resemblance to the type of trust here urged upon the Court.

The pleadings, memoranda, and arguments in this case have been filled with references to various possible disastrous consequences by the adoption of the position of one party or the other. The Court refuses to speculate, and does not base this Opinion upon any unproven allegations, either favorable or unfavorable to the Complainant, but, if one had the time, it might be an interesting mental exercise to conceive of replacing the shorelines of The State of Maryland to their composition and contour, and in all their pristine beauty, of the year 1634. Such would be the logical, if unreasonable, result should the theory of the Complainant be adopted, and the requested "Mandatory Injunction" issued by this Court.

Adapting, as she has, the theory of her cause of action, the Court can see no reasonably possible manner in which the Bill of Complaint can be amended to avoid its basic infirmity, nor any need for any further delay in granting an opportunity for such an amendment.

Having reached this decision in the matter, it becomes unnecessary to consider the standing of the Complainant to sue.

It is, therefore, this 31st day of August, 1970, by the Circuit Court for Worcester County, Maryland, ORDERED that:

1. The Petition to Intervene as Plaintiffs filed by the "North American Habitat Preservation Society" and R. Doyle Grabarek, President, and Individually, on January 26, 1970, is DENIED;
2. The Motion Ne Recipiatur filed by Defendant James B. Caine, Inc., to the said Petition to Intervene as Plaintiffs, on February 27, 1970, is DENIED;
3. The Motion Ne Recipiatur filed by Complainant to the said Motion Ne Recipiatur filed by the Defendant James B. Caine, Inc., on March 11, 1970, is DENIED;
4. The Motion Raising Preliminary Objection filed by the Defendant James B. Caine, Inc., on October 21, 1969, is DENIED;
5. The Motion Ne Recipiatur filed by Complainant to Demurrer of the Defendant Maryland Marine Properties, Inc., on November 7, 1969, is DENIED;
6. The Demurrer of Defendant Maryland Marine Properties, Inc., to the Bill of Complaint, filed on October 20, 1969, is SUSTAINED, without leave to the Complainant to amend;
7. The Demurrer of Defendant Board of Public Works to the Bill of Complaint, filed on October 21, 1969, is SUSTAINED, without leave to the Complainant to amend; and
8. The "Motion of Complainant for Summary Judgment Upon Same Issues" filed by the Complainant on May 11, 1970, being more in the nature of a Demand for Admission of Facts, (which would have been a more appropriate Pleading) is GRANTED, the facts therein having been conceded in the absence of any response thereto by the Defendants; and
9. The Complainant shall pay the costs of this proceeding.

DANIEL T. PRETTYMAN,
Judge

TRUE COPY, TEST: Frank W. Hales, Clerk

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 71-199, OCTOBER TERM, 1971

Elinor H. Kerpelman

Board Of Public Works Of Mary-
land, et al.

vs.

(Petitioner or Appellant)

(Respondent or Appellee)

The Clerk will enter my appearance as Counsel for the Respondent, Maryland Marine
Properties, Inc.

Signature

Thomas P. Perkins, III

Type or Print Name

Thomas P. Perkins, III

Address

1800 Mercantile Bank & Trust Building
Two Hopkins Plaza

City and State

Baltimore, Maryland 21201

NOTE: This appearance must be signed by an individual Member of the Bar of the Supreme
Court of the United States.

The Clerk is requested to notify counsel of action of the Court by means of:

- Collect Telegram
- Airmail Letter
- Regular Mail

NOTE: When more than one attorney represents a single party or group of parties, counsel should designate a particular individual to whom notification is to be sent, with the understanding that if other counsel should be informed he will perform that function.

In this case the person to be notified for
is:

- Petitioner(s)
- Respondent(s)
- Appellant(s)
- Appellee(s)
- Amicus

(Name—Type or Print)

(Street Address)

(City, State and Zip Code)

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-199

ELINOR H. KERPELMAN,
Petitioner,

v.

BOARD OF PUBLIC WORKS OF MARYLAND, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

**BRIEF IN OPPOSITION OF RESPONDENT
MARYLAND MARINE PROPERTIES, INC.**

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(301) 752-6780,
Attorney for Respondent,
Maryland Marine Properties, Inc.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-199

ELINOR H. KERPELMAN,

Petitioner,

v.

BOARD OF PUBLIC WORKS OF MARYLAND, ET AL.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

**BRIEF IN OPPOSITION OF RESPONDENT
MARYLAND MARINE PROPERTIES, INC.**

OPINION BELOW

Kerpelman v. Board of Public Works, 261 Md. 436, 276
A. 2d 56 (1971).

JURISDICTION

As is set forth in the Argument below, this Honorable Court lacks jurisdiction because the Petition for a Writ of Certiorari was not timely filed and because the decision of the Court of Appeals of Maryland was based solely upon adequate and independent state grounds.

QUESTIONS PRESENTED**I.**

Was the Petition for a Writ of Certiorari filed within ninety days of the entry of final judgment by the Court of Appeals of Maryland, the highest court of the State of Maryland?

II.

Was the decision of the Court of Appeals of Maryland based upon adequate and independent state grounds?

STATEMENT OF THE CASE

The Court of Appeals of Maryland, in its opinion and order filed on April 12, 1971 (Pet. 1A-8A), affirmed the order of the Circuit Court for Worcester County, Maryland dated August 31, 1970 (Pet. 21A-22A). The order of the lower court, *inter alia*, sustained without leave to amend the demurrer filed by this Respondent, Maryland Marine Properties, Inc., to the Bill of Complaint of Petitioner.

The Bill of Complaint challenged a transaction entered into in 1968 between Respondent, Board of Public Works of Maryland, and this Respondent, Maryland Marine Properties, Inc. The Bill of Complaint alleged that the Board of Public Works of Maryland, acting in accordance with the authority expressly vested in it by the then applicable provisions of Section 15 of Article 78A of the Annotated Code of Maryland (1965 Repl. Vol.), conveyed the State's interest in 197 acres of marshlands located in Worcester County on the Eastern Shore of Maryland, to Respondent, Maryland Marine Properties, Inc., the owner of the riparian shore line adjacent to the marsh. Such conveyance was alleged to have been made in exchange for the conveyance to the State of Maryland of other marshlands

owned by Respondent, Maryland Marine Properties, Inc. The concern expressed by Petitioner in her Bill of Complaint was that Respondent, Maryland Marine Properties, Inc., intended, in 1968, to fill and otherwise improve the marshlands in question. There is no allegation, however, in the Bill of Complaint that any such activity was or would be in violation of any federal, state or local statute or regulation, or that Respondent failed to obtain all necessary permits required by the various regulatory agencies.

In the Bill of Complaint, Petitioner based her standing to challenge the transaction above solely on her status as a taxpayer and resident of Baltimore City, which is far removed from the property in question, located on the Eastern Shore of Maryland.

ARGUMENT

I.

THE PETITION WAS FILED TOO LATE.

The Maryland Court of Appeals rendered its opinion and final order in this case on April 12, 1971. The Petition for a Writ of Certiorari was not filed in this Court until August 9, 1971, more than ninety days after the entry of the final order of the Court of Appeals of Maryland and without an extension being granted by a Justice of this Court. The decisions of this Court, the Maryland Court of Appeals and the United States District Court for the District of Maryland make it clear that such late filing violates the requirements of 28 U.S.C. §2101 (c) and Rule 22 of this Court and that the Petition, therefore, should be denied.

The test for determining when a judgment of a state court becomes final for the purpose of review by this Court and, therefore, for determining when the ninety-day period begins to run, was set forth in *Market Street*

Ry. v. R.R. Commission, 324 U.S. 548 (1945). Mr. Justice Jackson stated:

“The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment. . . . Such latent powers of state courts over their judgments are too variable and indeterminate to serve as tests of our jurisdiction. Our test is a practical one. When the case is decided, the time to seek our review begins to run.” (324 U.S. at 551-552.)

Under Maryland practice, it is clear that the issuance and docketing of the opinion and order of the Court of Appeals of Maryland, which in this case took place on April 12, 1971, is the critical date for the application of the rule set forth above. This is the date of decision referenced for this case and for all Maryland Court of Appeals cases by both the Maryland and Atlantic reports.

The Court of Appeals of Maryland has had specific occasion to *construe its own rules of appellate procedure* in light of the federal ninety-day requirement for certiorari. The Maryland court was squarely faced with the issue of what criminal convictions had become final under the test of *Linkletter v. Walker*, 381 U.S. 618 (1965) at the time the Maryland court handed down its landmark decision in *Schowgurow v. State*, 240 Md. 121, 213 A. 2d 475 (1965) on October 11, 1965. The resolution of this issue involved an express determination of whether in each case the time for the filing of a petition for writ of certiorari in this Court had expired. In *Tucker v. Warden of Maryland Penitentiary*, 243 Md. 331, 220 A. 2d 908 (1966), the Court of Appeals of Maryland expressly held that the prior Tucker conviction became final on July 13, 1965, the date the court issued an order dismissing the appeal. This

is the corresponding date to April 12, 1971 in this case. See also *Terry v. Warden of Maryland Penitentiary*, 243 Md. 610, 221 A. 2d 691 (1966). Similarly, in *Cowans v. Warden, Maryland Penitentiary*, 276 F. Supp. 696, 698 (D. Md., 1967), a *habeas corpus* case, the court held that the Petitioner's conviction became final on the date when the opinion on his direct appeal to the Maryland Court of Appeals was filed.

Ignoring the controlling authorities cited above, Petitioner contends that the date of the issuance of the mandate under Maryland practice is the critical date for the purpose of filing a petition for a writ of certiorari. Under Maryland practice, the issuance of a mandate is a routine ministerial function performed by the clerk of the court. See Rule 876b of the Maryland Rules of Procedure, Vol. 7B of the Annotated Code of Maryland (1963 Repl. Vol.). In the mandate, the clerk merely certifies the previous entry of the final action of the court. The date of the mandate has no significance for the purpose of determining the appropriate time in which to file a petition for certiorari in this Court.

II.

THE DECISION OF THE COURT OF APPEALS OF MARYLAND IN THE INSTANT CASE WAS BASED SOLELY UPON ADEQUATE AND INDEPENDENT STATE GROUNDS.

After a careful review of the factual allegations set forth in Petitioner's Bill of Complaint, the Maryland Court of Appeals affirmed the decision of the lower court, concluding that Petitioner had failed to establish her standing to sue. This Court has consistently held that it lacks jurisdiction to review judgments of state courts that rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945); *Fox Film Corp. v. Muller*, 296

U.S. 207, 209-210 (1935). A state court ruling based upon standing to sue constitutes adequate and independent state grounds. See *Cramp v. Board of Public Instruction*, 368 U.S. 278, 281-282 (1961).

To attack in this Court a decision based upon independent state grounds, Petitioner must clearly show that the ruling of the state court was frivolous and contrary to previous precedents or that the decision places a totally unreasonable obstacle in the way of judicial enforcement of alleged federal rights. Neither situation exists here.

The opinion of the Maryland Court of Appeals (Pet. 1A-8A) adopts a long line of Maryland authorities holding that a litigant has no standing to challenge the constitutionality or application of a statute unless an interest as a taxpayer is adequately alleged or unless the litigant alleges a special interest in the subject matter apart from that of the general public. The court properly found that Petitioner had made no such allegations in the instant case.

The ruling of the Maryland Court of Appeals concerns only the facts as alleged by the individual Petitioner. It is apparent from the court's opinion and from the prior Maryland decisions that other individuals or groups of individuals might well have standing to raise issues touched on by Petitioner and that the Maryland court in such event would decide on the merits a case which was properly presented to it. The Maryland doctrine of standing to sue, however, which is consistent with the general body of law on the subject, was intended to discourage, and rightly so, totally frivolous and ill-conceived litigation of which the instant case is a prime example.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS P. PERKINS, III,
Attorney for Respondent,
Maryland Marine Properties, Inc.

September 1, 1971

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-199

ELINOR H. KERPELMAN,
Petitioner,

v.

BOARD OF PUBLIC WORKS OF MARYLAND, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

**BRIEF FOR RESPONDENT
BOARD OF PUBLIC WORKS OF MARYLAND
IN OPPOSITION**

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JON F. OSTER,
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For Respondent,
Board of Public Works
of Maryland.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-199

ELINOR H. KERPELMAN,

Petitioner,

v.

BOARD OF PUBLIC WORKS OF MARYLAND, ET AL.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

**BRIEF FOR RESPONDENT
BOARD OF PUBLIC WORKS OF MARYLAND
IN OPPOSITION**

OPINION BELOW

The Opinion of the Court of Appeals of Maryland is reported in 261 Md. 436, and 276 A. 2d 56.

QUESTION PRESENTED

Whether the decision of the Court of Appeals of Maryland was based upon an independent state ground?

STATEMENT OF THE CASE

The Court of Appeals of Maryland affirmed the order of the Circuit Court for Worcester County, Maryland, sustaining without leave to amend the demurrers filed by Respondents, Maryland Marine Properties, Inc. and Board of Public Works of Maryland, to the Bill of Complaint of Petitioner.

The Bill of Complaint sought the issuance of a mandatory injunction requiring Maryland Marine Properties, Inc. and James B. Caine, Inc. to reconvey to the State of Maryland certain lands in Worcester County, Maryland, which had been conveyed by the Board of Public Works of Maryland in accordance with the power and authority vested in the Board by Section 15 of Article 78A of the Annotated Code of Maryland. In affirming the Order of the Circuit Court, the Court of Appeals of Maryland held that the Petitioner's decisive question before it was whether or not the Petitioner had standing to sue and having concluded that she did not have such standing did not reach the other questions posed in Petitioner's Bill of Complaint.

REASON FOR DENYING THE WRIT

THE DECISION OF THE COURT OF APPEALS WAS BASED UPON AN INDEPENDENT STATE GROUND.

The Court of Appeals concluded that the Petitioner had failed to establish her standing to sue. The United States Supreme Court has held that it lacks jurisdiction to review judgments of state courts that rest on adequate and independent state grounds:

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds (citing cases). The reason is so obvious

that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction." *Herb v. Pitcairn*, 324 U.S. 117, 125.

The Court of Appeals of Maryland held that the Petitioner had no standing to sue as a taxpayer because there were no allegations indicating that the actions complained of would result in higher State taxes to her and that her general allegations that the conveyances would have damaging effect upon the marine ecology of the State indicated an interest no different from that generally of citizens of the State (Pet. 5A-6A).

The United States Supreme Court has also held that one who sues as a taxpayer alleging injury by unconstitutional conduct must establish a direct dollar and cents injury or threat of injury (*Doremus v. Board of Education*, 342 U.S. 429), and that when a taxpayer seeks to restrain what he alleges are unconstitutional acts he must be able to show not only that the statute under which the government acts is invalid "but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way with people generally." *Massachusetts v. Mellon*, 262 U.S. 447 at 488. (Emphasis supplied.)

CONCLUSION

For the foregoing reason, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,

JON F. OSTER,
Assistant Attorney General
of Maryland,

For Respondent,
Board of Public Works
of Maryland.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

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ELINOR H. KERPELMAN,

Petitioner,

v.

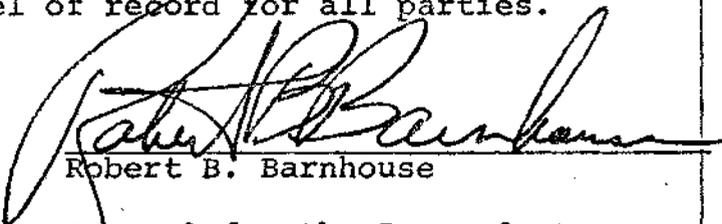
MARVIN MANDEL, Governor, LOUIS L. GOLDSTEIN,
Comptroller of the Treasury, and JOHN LUETKE-
MEYER, Treasurer, Constituting the BOARD OF
PUBLIC WORKS OF MARYLAND; JAMES B. CAINE,
INC. a Maryland Corporation, and MARYLAND MA-
RINE PROPERTIES, INC., a Maryland Corporation,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of September, 1971
three copies of this Brief in Opposition were mailed, post-
age prepaid to all counsel of record for all parties.



Robert B. Barnhouse

Counsel for the Respondent,
James B. Caine, Inc.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-199

ELINOR H. KERPELMAN,

Petitioner,

v.

MARVIN MANDEL, GOVERNOR, LOUIS L. GOLDSTEIN,
COMPTROLLER OF THE TREASURY, AND JOHN LUTKE-
MEYER, TREASURER, CONSTITUTING THE BOARD OF
PUBLIC WORKS OF MARYLAND; JAMES B. CAINE,
INC., A MARYLAND CORPORATION, AND MARYLAND MA-
RINE PROPERTIES, INC., A MARYLAND CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

**BRIEF FOR RESPONDENT, JAMES B. CAINE, INC.,
IN OPPOSITION**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-199

ELINOR H. KERPELMAN,

Petitioner,

v.

MARVIN MANDEL, GOVERNOR, LOUIS L. GOLDSTEIN,
COMPTROLLER OF THE TREASURY, AND JOHN LUETKE-
MEYER, TREASURER, CONSTITUTING THE BOARD OF
PUBLIC WORKS OF MARYLAND; JAMES B. CAINE,
INC., A MARYLAND CORPORATION, AND MARYLAND MA-
RINE PROPERTIES, INC., A MARYLAND CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

**BRIEF FOR RESPONDENT, JAMES B. CAINE, INC.,
IN OPPOSITION**

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at 261 Md. 436 and 276 A. 2d 56. The opinion of the Circuit Court for Worcester County, Maryland is unreported.

JURISDICTION

Jurisdiction is asserted by the petitioner pursuant to 28 U.S.C. 1257(3).

This respondent asserts, however, that the judgments sought to be reviewed were entered by the Court of Appeals of Maryland on November 16, 1970 and April 12, 1971 and the Petition was filed on August 9, 1971, more than ninety days after the entry of said judgments. This Court has no jurisdiction to entertain this Petition. 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to entertain this Petition since it was filed more than ninety days after the entry of the judgments by the Court of Appeals of Maryland.

2. Whether the issues decided below (i.e., the dismissal of an appeal because of late filing and the lack of petitioner's standing to sue) involve federal questions of substance.

STATUTE AND RULES INVOLVED

28 U.S.C. 2101:

"(c) Any other appeal or any Writ of Certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. * * *"

Rule 812, Maryland Rules of Procedure:

"(a) Whenever an appeal to this Court [Court of Appeals of Maryland] * * * is permitted by law, the order for appeal * * * shall be filed within thirty days from the date of the judgment appealed from, * * *"

Rule 870, Maryland Rules of Procedure:

“Except as otherwise provided by Rules 835 (Dismissal of Appeal) and 871 (Remand), this Court will either affirm or reverse the judgment from which the appeal was taken, or direct the manner in which it shall be modified, changed or amended. The decision of this Court shall be final and conclusive.”

Rule 876, Maryland Rules of Procedure:

“(a) The order of this Court dismissing an appeal or affirming or reversing in whole or in part, or modifying the judgment from which the appeal was taken, or awarding a new trial, or entering a final judgment pursuant to Rule 875 (Final Judgment in This Court) shall be evidenced by the mandate of this Court which shall be certified under the seal of this Court by the Clerk. It shall not be necessary for any formal order or judgment other than the mandate to be signed or transmitted to the lower court.

“(b) Unless otherwise ordered by this Court, the mandate shall be issued as of course by the Clerk upon the expiration of thirty days after the opinion of this Court has been filed or the order of judgment of this Court has been entered, and shall be transmitted by him to the lower court.”

STATEMENT OF THE CASE

Petitioner filed suit against the Board of Public Works of Maryland (Board), this Respondent and another Maryland corporation seeking to set aside conveyances of land from the Board to the corporate respondents. Petitioner brought the suit in her capacity as a Maryland taxpayer and alleged that the conveyances in question of a portion of the submerged land lying between the high-water lines and the bulkhead lines adjacent to the shore of two bays in Worcester County, Maryland, would have a deleterious effect upon the environmental conditions of the bays.

All respondents challenged the legal sufficiency of the complaint by demurrer and the trial court sustained their demurrers.

The Petitioner noted a timely appeal from the adverse decision in favor of the Board and the Co-Respondent, Maryland Marine Properties, Inc. Her appeal of the ruling in favor of this Respondent was not filed within the thirty day period required by Maryland Rule 812(a) and, accordingly, on November 16, 1970, the Court of Appeals of Maryland dismissed her appeal.

On April 12, 1971, the Court of Appeals entered a judgment affirming the order of the trial court in favor of the Board and the Co-Respondent, Maryland Marine Properties, Inc. That decision was based solely on the ground that the Petitioner did not have standing to prosecute the suit.

This Petition was filed on August 9, 1971, 266 days after the entry of judgment in favor of this Respondent and 119 days after the entry of judgment in favor of the Co-respondents.

ARGUMENT

I.

THIS COURT HAS NO JURISDICTION TO ENTERTAIN THE PETITION BECAUSE IT WAS FILED MORE THAN NINETY DAYS AFTER THE ENTRY OF THE JUDGMENTS OF WHICH REVIEW IS SOUGHT.

An order by the Court of Appeals of Maryland dismissing an appeal or affirming a judgment of a lower court constitutes a final judgment rendered by the highest Maryland court in which a decision may be had. Maryland Rule 870.

The order dismissing the appeal against this Respondent was entered on November 16, 1970. The order affirming the judgment in favor of the Co-Respondents was entered on

April 12, 1971. Both events occurred more than ninety days prior to the filing of the Petition.

Petitioner's contention that time should be measured from the date of issuance of the court's mandate is without merit. The entry of an order dispositive of an appeal constitutes a final judgment. That is the time "when the issues are adjudged." *Market Street R. Co. v. Railroad Com. of Cal.*, 324 U.S. 548, 551, 89 L. Ed. 1171, 1180, 65 S. Ct. 770 (1945). The subsequent issuance of the mandate is a routine function of the court clerk and is done simply to provide official evidence of the court's action. Maryland Rule 876.

It is clear that the issues raised by the Petition were adjudged by the Court of Appeals of Maryland more than 90 days prior to the filing of this Petition. This Court has no jurisdiction to entertain the Petition. 28 U.S.C. 2101(c).

II.

THE ISSUES DECIDED BELOW DID NOT INVOLVE FEDERAL QUESTIONS OF SUBSTANCE.

It is axiomatic that this Court will consider only those questions which were decided by the court below. The questions decided by the Maryland Court of Appeals and which were dispositive of this litigation involved the application of a local rule of procedure to the dismissal of an appeal because of late filing and a decision concerning the availability of Maryland's judicial machinery for the entertainment of a taxpayer suit.

The first question, involving the dismissal of the appeal against this Respondent presented the simple application of Maryland Rule 812(a) requiring an appeal to be noted within thirty days after the adverse ruling below.

The second question involved the application of the long-standing Maryland rule that Maryland taxpayers have no standing to prosecute actions in the Maryland courts challenging the validity of state action unless they show that the challenged action caused them a pecuniary loss or resulted in an increase of their taxes.

So long as the Maryland court in denying standing to the petitioner did not decide a federal question either directly or indirectly, this Court, based on its prior decisions, should not grant standing to the petitioner. *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L. Ed. 2d 285, 82 S. Ct. 275 (1961).

The Maryland Court of Appeals did not incorrectly pass upon the propriety of any state action. Its decisions are in accord with its past decisions; they are in accord with the decisions of this Court; and they do not depart from the accepted and usual course of judicial proceedings. In short, the decisions do not present issues on important federal questions which should be settled by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT B. BARNHOUSE,

JOSEPH G. FINNERTY, JR.,

LEE W. BOLTE,

Counsel for the Respondent,
James B. Caine, Inc.

September 7, 1971.

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of September, 1971, three copies of this Brief in Opposition were mailed, postage prepaid to Leonard J. Kerpelman, 2403 Rogers Building, Baltimore, Maryland, 21209, counsel for the Petitioner. I further certify that all of the parties to be served have been served.

ROBERT B. BARNHOUSE,

**Counsel for the Respondent,
James B. Caine, Inc.**

IN THE
Court of Appeals of Maryland

SEPTEMBER TERM, 1970

No. 364

ELINOR H. KERPELMAN,

Appellant,

v.

BOARD OF PUBLIC WORKS OF MARYLAND, ET AL.,

Appellees.

APPEAL FROM THE CIRCUIT COURT FOR WORCESTER COUNTY
(DANIEL T. PRETTYMAN, Judge)

**BRIEF OF APPELLEE,
BOARD OF PUBLIC WORKS OF MARYLAND**

FRANCIS B. BURCH,
Attorney General,

JON F. OSTER,
Assistant Attorney General,

For Appellee, Board of Public
Works of Maryland.

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IN THE
Court of Appeals of Maryland

SEPTEMBER TERM, 1970

No. 364

ELINOR H. KERPELMAN,

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BOARD OF PUBLIC WORKS OF MARYLAND, ET AL.,

Appellees.

APPEAL FROM THE CIRCUIT COURT FOR WORCESTER COUNTY
(DANIEL T. PRETTYMAN, Judge)

**BRIEF OF APPELLEE,
BOARD OF PUBLIC WORKS OF MARYLAND**

STATEMENT OF THE CASE

The Appellee, Board of Public Works of the State of Maryland, accepts the Statement of the Case as set forth in Brief of Appellee, Maryland Marine Properties, Inc.

QUESTIONS PRESENTED

1. Whether the action of the Board of Public Works in conveying certain marshlands and wetlands of the State

pursuant to its authority to dispose of lands of the State provided in Section 15 of Article 78A of the Annotated Code of Maryland may be subject to judicial review in the absence of an allegation of fraud or corruption?

2. Whether lands owned by the State under its navigable waters are held by the State in trust as an incident of the *jus publicum* and as such can not be alienated or disposed of by the State?

STATEMENT OF FACTS

The Appellee, Board of Public Works, adopts the Statement of Facts as set forth in Brief of Appellee, Maryland Marine Properties, Inc.

ARGUMENT

I.

THE ACTION OF THE BOARD OF PUBLIC WORKS IN CONVEYING CERTAIN MARSHLANDS AND WETLANDS OF THE STATE PURSUANT TO ITS AUTHORITY TO DISPOSE OF LANDS OF THE STATE PROVIDED IN SECTION 15 OF ARTICLE 78A OF THE ANNOTATED CODE OF MARYLAND IS NOT SUBJECT TO JUDICIAL REVIEW IN THE ABSENCE OF AN ALLEGATION OF FRAUD OR CORRUPTION.

Section 15 of Article 78A of the Annotated Code of Maryland provides in pertinent part as follows:

“Any real or personal property of the State of Maryland or of any board, commission, department or agency thereof, and any legal or equitable rights, interests, privileges or easements in, to, or over the same, may be sold, leased, transferred, exchanged, granted or otherwise disposed of to any person, firm, corporation, or to the United States, or any agency thereof, or to any board, commission, department or other agency of the State of Maryland for a consideration adequate in the opinion of the Board of Public

Works, or to any county or municipality in the State subject to such conditions as the Board of Public Works may impose. . . . As used herein, the term 'real or personal property or any legal or equitable rights, interests, privileges or easements in, to, or over the same' shall include the inland waters of the State and land under said waters, as well as the land underneath the Atlantic Ocean for a distance of three miles from the low watermark of the coast of the State of Maryland bordering on said ocean, and the waters above said land. . . ."

Pursuant to such authority, certain lands located in Worcester County, portions of which are under the navigable waters of the State, have been sold by the Board of Public Works. In her Bill of Complaint the Appellant alleges that the sale to the Appellee, Maryland Marine Properties, Inc., of 197 acres of State land was for a totally inadequate and insufficient consideration, and that the Board of Public Works "had a mistaken, unreasonable, or totally false opinion of such adequacy" (E. 2).

The proposition is firmly established that when a governing body such as the Board of Public Works, which is clothed with discretionary powers, acts within the powers conferred upon it by law its conclusions even if mistaken will not be reviewed by the courts in the absence of a showing that its power has been fraudulently or corruptly exercised. *Fuller Co. v. Elderkin*, 160 Md. 660, 669 (1931); *Hanna v. Board of Education of Wicomico County*, 200 Md. 49 (1952).

In her Bill of Complaint the Appellant failed to allege fraud or corruption on the part of the Board of Public Works and, accordingly, the Order of the Circuit Court for Worcester County sustaining the Demurrer of the Appellee, Board of Public Works, should be affirmed.

II.

LANDS OWNED BY THE STATE UNDER ITS NAVIGABLE WATERS ARE NOT HELD IN TRUST AS AN INCIDENT OF THE *JUS PUBLICUM* AND CAN BE ALIENATED OR DISPOSED OF BY THE STATE.

The Appellant relies upon the cases of *Commonwealth v. City of Newport News*, 164 S.E. 689 (1932), and *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892) in support of her argument that State lands under its navigable waters are held by the State in trust as an incident of the *jus publicum* and as such cannot be alienated or disposed of by the state.

In *Commonwealth v. City of Newport News, supra*, the Supreme Court of Virginia held that the General Assembly of Virginia had the power to authorize the City of Newport News to discharge raw, untreated sewage into the waters of Hampton Roads. It also held that the questions of what extent these waters might be used for sewage disposal; what extent these waters should be devoted to purposes of fishery; and what restrictions and limitations should be placed on these uses were questions committed by the Constitution of Virginia to the discretion of the Legislature free from the control or interference of either the executive or judicial departments of the government.

More important for the purposes of the instant matter, the Supreme Court of Virginia observed that it confused the issue "to discuss the rights of the people to the tidal waters and their bottoms from the standpoint of a trust or limitation imposed by the State Constitution on the state as a sovereign entity." *Supra*, p. 696. Accordingly, the Virginia Court did not consider whether the rights there in question were inherent and inseparable incidents of the governmental power and *jus publicum* of the state and said: "Nor are we considering to what extent that fact, if

it be a fact, operates to limit the power of the Legislature to dispose of tidal waters and their bottoms, or to authorize, permit, or suffer them to be used for other purposes, either private or public." *Supra*, p. 697.

In *Illinois Central R.R. v. Illinois*, *supra*, the Supreme Court of the United States held that the State of Illinois was the owner in fee of submerged lands constituting the bed of Lake Michigan which an Act of the State of Illinois in 1869 had purported to grant to the Illinois Central Railroad Company, and that a subsequent Act of the State in 1873 repealing the Act of 1869 was valid and effective for the purpose of restoring to the State the same control, dominion and ownership of such lands that the State had prior to the passage of the Act of 1869. This case does contain some rather broad and general statements by Mr. Justice Field concerning the nature of the title which the State held in submerged lands for the people but it is important to bear in mind that Mr. Justice Field's statements were made in light of a factual situation in which the State of Illinois in the Act of 1869 had granted the Illinois Central Railroad Company the submerged land under the harbor of Chicago embracing something more than 1,000 acres.

In the later case of *Shively v. Bowlby*, 152 U.S. 1 (1894), the Supreme Court observed that "[t]he . . . summary of the laws of the original states shows that there is no universal and uniform law upon the subject; but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore,

is necessary in applying precedents in one state to cases arising in another." *Supra*, p. 26.

Even if the statements of Mr. Justice Field in the *Illinois Central Railroad* case, *supra*, did stand for the proposition that submerged lands of the state are an incident of the *jus publicum* and cannot be alienated, which they do not, the case would not be authority for the application of this principle in Maryland because of the extraordinary facts involved in the *Illinois Central Railroad* case, *supra*, and the subsequent statement of the Supreme Court in *Shively v. Bowlby*, *supra*, that there are no universal and uniform laws concerning state owned land under the tide waters within its borders.

CONCLUSION

For the foregoing reasons the Opinion and Order of the Circuit Court for Worcester County sustaining the Demurrer of the Appellee, Board of Public Works, to the Bill of Complaint of the Appellant without leave to amend should be affirmed.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General,

JON F. OSTER,
Assistant Attorney General,

For Appellee, Board of Public
Works of Maryland.

IN THE
Court of Appeals of Maryland

SEPTEMBER TERM, 1970

No. 364

ELINOR H. KERPELMAN,
Appellant,

v.

BOARD OF PUBLIC WORKS OF MARYLAND, ET AL.,
Appellees.

APPEAL FROM THE CIRCUIT COURT FOR WORCESTER COUNTY
(DANIEL T. PRETTYMAN, Judge)

**BRIEF OF APPELLEE,
MARYLAND MARINE PROPERTIES, INC.**

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Inc.

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IN THE
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APPEAL FROM THE CIRCUIT COURT FOR WORCESTER COUNTY
(DANIEL T. PRETTYMAN, Judge)

**BRIEF OF APPELLEE,
MARYLAND MARINE PROPERTIES, INC.**

STATEMENT OF THE CASE

This is an appeal from the Opinion and Order of the Circuit Court for Worcester County (Prettyman, J.) dated August 31, 1970 (E. 11). The Order appealed from sustains, without leave to amend, the demurrers of Appellees Maryland Marine Properties, Inc. and Board of Public Works of Maryland to the Bill of Complaint filed below (E. 1). The Bill of Complaint sought the issuance of a

mandatory injunction to force the reconveyance of the State's interest in 197 acres of wetlands allegedly conveyed by the Board of Public Works to Maryland Marine Properties in 1968. The other rulings of Judge Prettyman set forth in the Order of August 31, 1970 are not challenged in the brief of the Appellant filed herein.

Appellant has also noted an appeal from the Order of the Circuit Court for Worcester County (Prettyman, J.) dated September 22, 1970. This Order sustained the demurrer of Defendant James B. Caine, Inc. (E. 30). On November 16, 1970, however, this Honorable Court granted a motion to dismiss the Caine appeal.

QUESTIONS PRESENTED

1. Does Appellant have standing to sue in this case?
2. Has Appellant sufficiently alleged grounds which would subject to judicial review the discretionary action of the Board of Public Works challenged in the Bill of Complaint?
3. Does Section 15 of Article 78A of the Annotated Code of Maryland contravene any provision of the Maryland Constitution?
4. Is Appellant barred by laches?

STATEMENT OF FACTS

The facts alleged in the Bill of Complaint which affect Appellee Maryland Marine Properties, Inc. are set forth below. These facts are, of course, accepted for the purposes of the demurrers.

First, Appellant is a taxpayer and resident of Baltimore City. Second, in 1968, the Board of Public Works of Maryland, acting in accordance with the authority vested in

it by the then applicable provisions of Section 15 of Article 78A of the Annotated Code of Maryland (1965 Repl. Vol.), conveyed the State's interest in 197 acres of marsh lands, wetlands and shallows located in Worcester County, Maryland to the riparian owner, Appellee Maryland Marine Properties, Inc. in exchange for marsh lands worth \$41,000. Third, the Bill of Complaint further alleges that Appellee Maryland Marine Properties, Inc. is filling in the lands in question.

There is no allegation in the Bill of Complaint that Appellee has failed to obtain all permits which were required at such time by the appropriate federal, state and local authorities having jurisdiction in the premises. Further, there is no allegation that the challenged transaction or the filling operations will in any way affect navigation or will in any way affect fishing in the bay other than the most extreme speculation, unsupported by any factual allegations, that this particular transaction will have the direst consequences to the entire Maryland ecological system.

Additional facts are alleged with regard to a transaction between the Board of Public Works of Maryland and James B. Caine, Inc., a Defendant below. This Defendant is no longer a party to this appeal. Other than the factual allegations recited above, the Bill of Complaint consists entirely of legal argument and mere conclusions.

ARGUMENT

I.

APPELLANT DOES NOT HAVE STANDING TO CONTEST THE CONSTITUTIONALITY OF SECTION 15 OF ARTICLE 78A OR TO CHALLENGE THE TRANSACTION ENTERED INTO IN THIS CASE PURSUANT TO SUCH STATUTE.

Appellant seeks in this case a mandatory injunction to set aside a transaction between Appellee Maryland Marine

Properties, Inc. and Appellee Board of Public Works of Maryland affecting property in Worcester County, Maryland and entered into strictly in accordance with express statutory authority. The court below did not reach the question of standing inasmuch as the demurrers were sustained on other grounds (E. 23). The question of standing, however, is a threshold question and should be considered at the outset, because it is determinative of this case.

Further, this Court has already ruled on this very point in a similar case. In *Board of Public Works v. Larmer* (No. 345, September Term, 1970), which is currently pending before this Court, the Appellant, Mrs. Kerpelman, filed a petition to intervene in the lower court. Her allegations of standing in *Larmer* were the same as the allegations in this case. The lower court ruled that Mrs. Kerpelman lacked standing and this decision was affirmed by this Court. *Kerpelman v. Larmer* (No. 412, September Term, 1969; appeal dismissed March 3, 1970).

Appellant does not allege standing in this case based upon any statutory provision. She does not allege that she has any special interest of any kind in the transaction which she questions. Indeed, she alleges that she is in fact not even a resident of Worcester County, but a resident of Baltimore City, conceding that she has no interest of any kind in this case other than as a member of the general public residing in the State of Maryland. Her standing is alleged purely as a taxpayer and also as a general beneficiary of an alleged public trust. These theories will be considered separately below.

A. *Standing as a taxpayer*

In the first paragraph of the Bill of Complaint, Appellant states that her standing to sue is based upon the fact that she is a taxpayer. As indicated above, this allegation is

made all the more tenuous by the fact that she is not even a taxpayer of Worcester County, where the property in question is located.

In the most recent case in point, *Stovall v. Secretary of State*, 252 Md. 258 (1969), this Court affirmed the decision of the lower court sustaining a demurrer to a taxpayer's suit due to the lack of the standing of the plaintiff to sue. The *Stovall* case concerned a matter of considerable public concern and attention, the transfer of control over Morgan State College. Judge McWilliams stated the applicable rule as follows:

"In Maryland taxpayers have standing to challenge the constitutionality of a statute when the statute as applied increases their taxes, but if they cannot show a pecuniary loss or that the statute results in increased taxes to them, they have no standing to make such a challenge." (252 Md. at 263).

See also *Murray v. Comptroller*, 241 Md. 383, 391 (1966); *Citizens Committee v. County Commissioners*, 233 Md. 398 (1964); *Baltimore v. Gill*, 31 Md. 375, 394 (1869). In *Stovall*, Judge McWilliams cited with approval the following passage from the *Citizens Committee* case:

"While the appellants claim that the carrying out of the provisions of the alleged unconstitutional and invalid laws, ordinances and resolutions, has resulted in loss and damage to them and all other taxpayers in the county, they have failed to prove or show any special damage or loss which is peculiar to themselves as taxpayers or otherwise." (233 Md. at 400).

Appellant fails to allege any facts in the Bill of Complaint establishing a valid taxpayer interest. In the *Murray* case, *supra*, Judge Oppenheimer found that the Plaintiff did have standing inasmuch as it was clear that if church-owned property, the subject matter of the suit, were placed

on the tax rolls, property taxes for individual property owners such as Mrs. Murray, would be reduced. Appellant makes no such allegation here. In fact, the only allegations are directly to the contrary. In paragraph 6 of the Bill of Complaint, Appellant admits that the transactions which she challenges will actually increase the state tax base by putting additional property on the tax rolls. Despite this concession, which is decisive on this issue, Appellant engages in totally unsupported speculations in a futile attempt to establish standing as a taxpayer. She predicts that the conveyance of the relatively small acreage of wetlands challenged in this case will have immediate and dire consequences to the entire marine ecology of the State of Maryland. These speculations are not supported by a single allegation of fact.

The only relevant facts alleged in the Bill of Complaint are that this case concerns the State's interest, if any, in 197 acres of riparian wetlands, which were exchanged for marsh lands which Appellant concedes to be worth at least \$41,000, thereby actually increasing the inventory of such property in state ownership and control.

Despite the wild predictions in the Bill of Complaint, it remains clear that this appeal concerns only 197 acres of wetlands whereas in the State of Maryland there are 3,190 miles of tidal shore line supporting such wetlands, Hall of Records Commission, *Maryland Manual, 1969-1970*, p. 23 (1970), and whereas there are more than 300,000 acres of swamp and marshes in the State of Maryland (II Maryland State Planning Department, *Wetlands in Maryland — Technical Report V-I* (1970)). In view of these facts and statistics, no one could seriously contend that the specific transaction challenged here could have such an impact on marine ecology as to adversely affect the interests of Maryland taxpayers and thereby create standing to sue.

It is clear from the Bill of Complaint that what the Appellant is really concerned about is not the particular transaction challenged in this case, but the long-range policy of the State of Maryland with regard to the preservation of wetlands. The proper forum in which to resolve these broad issues of public policy is the Legislature. Appellant must take solace in the fact that since this suit was filed the Legislature, at its 1970 session, totally revised the laws in this area.

*B. Standing to sue as a general beneficiary
of a public trust.*

In paragraphs 2 and 3 of the Bill of Complaint, Appellant also seems to base her standing as a general beneficiary of an alleged public trust, citing as her authority Article 6 of the Declaration of Rights of the Constitution of Maryland. This Article provides in material part "all persons invested with the Legislative or Executive powers of Government are the Trustees of the Public, and, as such, accountable for their conduct. . . ."*

As set forth above, the Maryland law with regard to standing has been fully articulated in numerous opinions of this Court. To challenge the constitutionality of a statute or the application of a statute, the litigant must show a taxpayer interest or a special interest in the subject matter other than that of the general public. No Maryland case has ever established standing on the novel theory suggested here. To adopt such a theory would

* Interestingly enough, Article 6 goes on to indicate that the remedy afforded to a citizen for a breach of the public trust is not litigation but revolution, the framers philosophizing:

"Wherefore, whenever the ends of Government are perverted . . . the People may, and of right ought, to . . . establish a new Government; the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish and destructive of the good and happiness of mankind." Md. Decl. of Rights, Art. 6.

constitute a significant departure from the consistent pattern of Maryland law developed from *Baltimore v. Gill, supra*, through *Stovall v. Secretary of State, supra*. Under the Maryland Constitution, the Board of Public Works and all other agencies are trustees of the public in all that they do. If Appellant has standing to sue as a general beneficiary of an intangible trust in this case, then every public action is subject to judicial review at the suit of any resident. A resident of Worcester County, for example, may bring suit to enjoin the action of the Mayor and City Council of Baltimore in closing a public street. More significantly, the Plaintiffs in the *Stovall* case would clearly have had standing to challenge as important a public action as the determination of the future academic role of Morgan State College. This Court, however, has wisely placed restraints on the use of the courts to contest the actions of other branches of government. These restraints should be kept in force. Inasmuch as the Appellant lacks standing to sue, the judgment appealed from should be affirmed on this basis.

II.

THE ACTION OF THE BOARD OF PUBLIC WORKS CHALLENGED IN THIS CASE WAS A PROPER EXERCISE OF A CONSTITUTIONAL STATUTORY POWER.

A. *Appellant has failed to allege facts which would subject to judicial review the action of the Board of Public Works challenged in the Bill of Complaint.*

In this case, Appellant seeks the extreme equitable remedy of a mandatory injunction to force the reconveyance of the State's interest in riparian property in accordance with action taken by the Board of Public Works in 1968. Although the courts of this State have the power to grant such relief (Maryland Rule BB 70a), it is a well established principle of equity that this power will only

be exercised with the greatest caution. *Maryland Trust Co. v. Tulip Realty Co.*, 220 Md. 399, 412 (1959).

In paragraph 3 of the Bill of Complaint, Appellant alleges that in 1968 the Board of Public Works agreed to transfer the interest of the State in 197 acres of submerged land to the riparian owner, Maryland Marine Properties, Inc. Appellant concedes that this transaction was made in accordance with the express statutory authority granted by the Legislature to the Board of Public Works pursuant to the then applicable provisions of Section 15 of Article 78A of the Annotated Code of Maryland (1965 Repl. Vol.). This statute is both broad and specific with regard to the grant of power to the Board in this instance. It gives the Board power to convey any interest of the State in real or personal property "for a consideration adequate in the opinion of the Board of Public Works." Property may be transferred to or may be exchanged with any person or corporation and the term real or personal property or any interest therein expressly includes "the inland waters of the State and land under said waters."

The Bill of Complaint makes it clear that an exchange was made pursuant to the statute. There is no allegation that the consideration was not considered adequate in the opinion of the Board of Public Works. There is no allegation that there was any procedural irregularity of any kind in connection with this transaction.

In order to obtain judicial review of the action of the Board of Public Works challenged in this case, it is clear that Appellant must show that the Board's discretionary power was fraudulently or corruptly exercised. *Hanna v. Board of Education*, 200 Md. 49, 51 (1952); *Coddington v. Helbig*, 195 Md. 330, 337 (1950). The leading case with regard to discretionary actions of the Board of Public Works is a lower court opinion which states the same

principle of law set forth above. *Terminal Construction Corp. v. Board of Public Works* (Cir. Ct. of Baltimore City, *Daily Record*, July 29, 1957).

Appellant does not allege any facts to support her contention in the Bill of Complaint that the Board of Public Works acted fraudulently in this case. Indeed, she appears to have abandoned this contention in her brief on appeal. Fraud is a most serious charge, particularly when made against the Governor, the Comptroller and the Treasurer of the State of Maryland. It should be supported by substantial factual allegations which are totally absent here. Therefore, the merits of the action of the Board challenged in this case are not subject to judicial review.

B. *The provisions of Section 15 of Article 78A in effect in 1968 did not contravene any provision of the Maryland Constitution.*

The main thrust of the argument advanced in Appellant's brief is that Section 15 of Article 78A of the Annotated Code of Maryland (1965 Repl. Vol.), as it existed in 1968, is unconstitutional. She argues that the legislative and administrative branches of government are powerless to enact laws and to enter into agreements which would in any way affect Maryland's tidelands. It is most significant that under her theory, the 1970 revisions of the laws in this area, as enacted by the General Assembly, are equally as unconstitutional as the statute challenged in this case.

Appellant's constitutional theory is the invention of what she considers to be necessity. Her Bill of Complaint reflects her personal sense of frustration in the ability of anyone other than the courts to consider the interests of the public in tidewater and wetland areas. On the contrary, legislative concern on these issues has been and is

continuing to develop rapidly, but it is significant that it was very much in evidence at the time of the particular transaction which is the subject matter of this suit. In this regard, it should be helpful to review the federal, state and local regulatory pattern as it existed in 1968.

Under the provisions of the Rivers and Harbors Act, 33 U.S.C.A. §403 (1970), no filling or bulkheading of any kind in tidal waters may be commenced without the prior approval of the U. S. Army Corps of Engineers, in order to protect the interests of navigation. Further, prior to granting approval for any such activities, the Corps of Engineers was and is required by law to consult with the U. S. Fish and Wild Life Service of the Department of the Interior "with a view to the conservation of wild life resources." 16 U.S.C.A. §662 (a) (1960). Therefore, the interests of navigation and conservation must be considered by the appropriate federal authorities before the type of activities about which Appellant complains may be carried out. In addition, fill and bulkhead activities were subject in 1968 to the issuance of a permit from the Maryland State Department of Water Resources pursuant to the provisions of Section 12 of Article 96A of the Annotated Code of Maryland (1970 Supp.) and the approval of the Worcester County Shoreline Commission by virtue of the provisions of Sections 15A and 15B of the Code of Public Local Laws of Worcester County (1961 Edition and 1968 Supp.). There is no allegation in the Bill of Complaint that Appellee failed to obtain any and all such approvals before commencing filling operations or that these agencies shared her conviction that the particular transaction challenged here would have a serious impact on Maryland's ecological system.

In considering the constitutionality of Section 15 of Article 78A, it is also essential to determine what property

rights, if any, the State surrendered to the riparian owner, Maryland Marine Properties, Inc. in the transaction challenged in this case. If none were in fact given up, Appellant has no cause for complaint and the constitutional argument is moot.

This Court presently has before it the important case of *Board of Public Works v. Larmar* (No. 345, September Term, 1970). In *Larmar*, Judge Prettyman held that the riparian owner was free to fill wetlands and bulkhead out to the established bulkhead line without paying any compensation to the State and subject only to the prior approval of the Worcester County Shoreline Commission. Judge Prettyman held that once having filled the land, the riparian owner has vested title to the fee, free and clear of the right and claim of the State of Maryland or of any other person, firm or corporation.

This brief is not the place to reargue the *Larmar* case. The leading case is *Goodsell v. Lawson*, 42 Md. 348 (1875) where this Court held that fee simple title to the site of what is now a substantial part of the town of Crisfield was created by virtue of the filling in of submerged land. The only difference was that oyster shells were used a century ago to make new fast land, instead of sand and mud. *Goodsell* and other Maryland precedents appear to support the conclusions reached by Judge Prettyman in the *Larmar* case.

Also directly in point is the recent opinion of Judge Thomsen in the Assateague Island condemnation cases, *U. S. v. 222.0 Acres of Land*, 306 F. Supp. 138, 156 (D. Md. 1969). After a careful analysis of the Maryland law, Judge Thomsen concluded that the riparian owners, who had filled in land after obtaining the necessary permits, but without compensation to the State, held title to the land

in fee simple, subject only to the paramount right of the United States to protect navigation and the right of the State to condemn land for a public purpose.

If this Honorable Court affirms the *Larmar* decision, it necessarily follows that this case must also be affirmed. It would then be clear that the State had no property interest to convey to Maryland Marine Properties, Inc. and that the transaction challenged here was just icing on the cake, with the State getting, in effect, something for nothing.

Even if this Court rules, however, that in order to obtain clear title, the Larmar Corporation was required to obtain all necessary permits and/or to acquire the State's interest in submerged land, this case must still be affirmed. It is clear in this case that Maryland Marine Properties, Inc. has never challenged the regulatory powers of the State as did the Larmar Corporation. In fact, this Appellee not only obtained the necessary permits, but, as set forth in the Bill of Complaint, actually conveyed marshlands to the State in exchange for the residual interest, if any, which the State might have possessed in the land filled by Appellee. Again, it is significant that Judge Thomsen held in the Assateague Island cases that a riparian owner who obtains the necessary permits acquires clear title to the filled land without the necessity of paying any compensation to the State.

Appellant, in her brief, ignores the entire body of Maryland law on the subject. She instead contends that Section 15 of Article 78A is unconstitutional. There is no possible question of federal constitutional law involved here. The Supreme Court has held that the delineation of riparian rights is subject to the determination of the individual states. *Shively v. Bowlby*, 152 U.S. 1 (1894).

In support of her constitutional argument, the only provision of the Maryland Constitution to which Appellant refers is Article 6 of the Declaration of Rights. This provision, as discussed above, merely contains a general statement that all public officials are trustees of the public in all that they do. Appellant argues primarily that her "inalienable" property right in the land in question here is a permanent and immutable element of the common law. In support of this novel doctrine, she cites no Maryland authorities, but only cases from other jurisdictions. Judge Prettyman properly rejected this theory in his opinion below.

A careful reading of the cases upon which Appellant relies in her brief makes it clear that these cases do not support her theory. On page 3 of her brief, Appellant places her main reliance upon *Commonwealth of Virginia v. City of Newport News*, 158 Va. 521, 164 S.E. 689 (1932). In this case, the Commonwealth of Virginia brought suit to restrain the City of Newport News from dumping untreated sewage into Hampton Roads and thereby polluting the oyster beds in the Roads and its estuaries. The City filed a demurrer which was sustained. This ruling was affirmed on appeal. In the Virginia case, the Court stated that it had given no consideration as to whether the right of navigation is a part of the *jus publicum*. This question was not before the Court, because the activity complained of did not interfere with navigation (158 Va. at 548, 164 S.E. at 697). Similarly, there is no allegation of any interference with navigation in this case.

The Virginia Court did hold, however, that the use and enjoyment by the people of the Commonwealth of tidal waters and their bottoms for the purpose of taking fish and shell fish is an incident of the *jus privatum* of the State and not of the *jus publicum*. This holding is, of

course, directly contrary to the basic contention of the Appellant. The Virginia Court expressly held that the State Legislature has the right to permit its tidal waters or their bottoms to be used for purposes which impair or even destroy their use for the purposes of fishery and may lease or sell to private persons portions of its tidal bottoms with the right to use them for private purposes to the exclusion of the use of the waters for purposes of fishery (158 Va. at 552-553, 164 S.E. at 698-699).

The second case relied upon by Appellant is *Illinois Central R. R. v. Illinois*, 146 U.S. 387 (1892). It is extremely significant that in the course of this lengthy opinion, the Court expressly held that the railroad's ownership in fee of several lots on the lakeshore gave it the right, as riparian owner, to fill in the shallows in front of these lots up to the point where the lake became navigable (146 U.S. at 446). This, of course, is all that Maryland Marine Properties, Inc. is alleged to have done in this case.

The primary issue in the *Illinois Central* case concerned the question of title to approximately 1,000 acres of the bed of Lake Michigan, which constituted virtually the whole of the Chicago harbor, extending a mile from the shore. The Court held that the railroad did not have title to this acreage inasmuch as a Legislative grant of the land had subsequently been repealed. These broader aspects of the *Illinois Central* case bear no resemblance to the factual allegations of the case at bar.

Judge Prettyman held in this case that whatever the status of the common law on the subject, it is fundamental that the Legislature has the power to change or amend the common law. This the Legislature clearly did by enacting Section 15 of Article 78A. The powers delegated to the Board of Public Works can, of course, be modified, as was done by the 1970 Legislature or these powers can be re-

voked. Further, the rights of riparian owners can also be substantially modified as was also done by the 1970 Legislature. The Legislature is the proper forum in which to resolve the important questions presented in balancing the interest of conservation on the one hand against the interest of the State in encouraging development. There is, of course, a public interest, or trust in a very broad sense, in the preservation of wetlands. It is the function of the Legislature to delineate the nature and extent of this public interest or trust.

Appellant seeks to resolve judicially broad issues of public policy. She asks this Court to adopt retroactively a legal doctrine which has never been applied in Maryland, which is contrary to the express policy established by the Legislature, and which requires the Court to adopt a totally unorthodox approach to constitutional law. Further, even if the theory were adopted as an abstract proposition, it is difficult to see how it would entitle her to the relief requested in this case.

More important, if Appellant's theory were adopted, riparian property owners would be absolutely prohibited from all bulkheading and filling activities, the Legislature would be precluded from passing laws in this important area and the title to vast acreages of reclaimed land throughout Maryland would be placed in jeopardy. And to what purpose? As Judge Prettyman observed, it is impossible to undo what has already been done. As he stated in his opinion below:

“. . . it might be an interesting mental exercise to conceive of replacing the shorelines of The State of Maryland to their composition and contour, and in all their pristine beauty, of the year 1634. Such would be the logical, if unreasonable, result should the theory of the Complainant be adopted, and the requested 'Mandatory Injunction' issued by this Court." (E. 23).

The extreme theory of the public trust, with all its implications, as advanced by the Appellant is not sound. It is not, and should not be, the law of Maryland.

III.

APPELLANT IS BARRED BY LACHES.

On September 30, 1969, Appellant filed this suit challenging transactions of the Board of Public Works which she states in her Bill of Complaint were completed in 1968. The Board of Public Works is a public body. Its statutory powers are exercised and performed in public session and are fully subject at such time to public scrutiny. Nevertheless, Appellant delayed for more than a year the filing of a suit to challenge the agreements entered into by the Board of Public Works in 1968. Further, she belatedly attacks the right of a riparian property owner to develop shoreline property when it is clear that the property owner, Maryland Marine Properties, Inc., complied with all federal, state and local laws which were applicable at the time prior to the commencement of development.

It is a well accepted maxim that equity "aids the vigilant and will not give relief to a person who has been dilatory in bringing his cause of action." *James v. Zantzinger*, 202 Md. 109, 116 (1953). In the recent case of *Parker v. Board of Election Supervisors*, 230 Md. 126 (1962), this Court upheld the ruling of the trial court sustaining a demurrer and dismissing an action in an election case on the grounds of laches. The court observed that laches is a "defense in equity against stale claims, and is based upon grounds of sound public policy by discouraging fusty demands for the peace of society." (230 Md. at 130).

The above quotation is particularly applicable to the allegations set forth in the Bill of Complaint in this case. Appellant belatedly seeks to reopen matters which have long since been properly closed. Her motive in so doing is to challenge state policy. Her real concern is the future application of such policy rather than with its application to the transaction questioned in this case. If this transaction were to be challenged at all, it should have been challenged at the time it was consummated, in 1968, and not more than a year later. Although the Court below was not required to reach this point, it is clear that this suit is barred by laches and that the demurrers could have been sustained on this basis alone.

CONCLUSION

For the foregoing reasons, the judgment appealed from should be affirmed.

Respectfully submitted,

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Attorneys for Appellee,

Maryland Marine Properties,
Inc.

IN THE
Court of Appeals of Maryland

SEPTEMBER TERM 1970

No. 364

ELINOR H. KERPELMAN,
Appellant,

vs.

MARVIN MANDEL, Governor, LOUIS L. GOLD-
STEIN, Comptroller of the Treasury, and JOHN
LUETKEMEYER, Treasurer; constituting the
BOARD OF PUBLIC WORKS OF MARYLAND,
JAMES B. CAINE, INC., a Maryland Corporation,
and MARYLAND MARINE PROPERTIES, INC., a
Maryland corporation,

Appellees.

Appeal from the Circuit Court of Worcester County
(PRETTYMAN, J.)

APPELLANT'S BRIEF AND APPENDIX

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IN THE
Court of Appeals of Maryland

SEPTEMBER TERM 1970

No. 364

ELINOR H. KERPELMAN,
Appellant,

vs.

MARVIN MANDEL, Governor, LOUIS L. GOLD-STEIN, Comptroller of the Treasury, and JOHN LUETKEMEYER, Treasurer; constituting the BOARD OF PUBLIC WORKS OF MARYLAND, JAMES B. CAINE, INC., a Maryland Corporation, and MARYLAND MARINE PROPERTIES, INC., a Maryland corporation,
Appellees.

Appeal from the Circuit Court of Worcester County
(PRETTYMAN, J.)

APPELLANT'S BRIEF AND APPENDIX

STATEMENT OF THE CASE

This is an appeal from a judgment of the Circuit Court for Worcester County, Maryland, filed August 31, 1970, which was expanded and/or amended on September 22, 1970, (but the whole judgment of August 31, 1970, was appealed from) in which the Court entered a judgment dismissing the Appellant's Bill of Complaint for a Mandatory Injunction and for Declaratory Relief, as to all Defendants.

It is from the Order of August 31, 1970, expanded and amended on September 22, 1970, from which this appeal is entered against all Appellees, including James B. Caine, Inc., who has ostensibly been let out by Chief Judge Hammond.

QUESTIONS PRESENTED

1. Did the alienation of wetlands by the Board of Public Works of Maryland, and dismissal of the Bill of Complaint below amount to a taking of property of the individual Plaintiff, or of the class which she represents, without Due Process of Law in violation of the Fourteenth and Fifth Amendments to the United States Constitution, and in violation of the Ninth Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment?

2. Are submerged lands covered by navigable waters alienable by the State, or inalienable as part of the *jus publicum*?

3. Are they inalienable under a trust theory generally?

4. Are they inalienable under a trust theory under the circumstances alleged in this Bill of Complaint?

5. Did alienation under the circumstances alleged in this Bill of Complaint violate rights of the Plaintiff under the Fifth and Fourteenth Amendments, and the Ninth Amendment, to the Constitution of the United States?

6. Are the lands inalienable under the Maryland Constitution, and the Common Law of England which is in effect now in this State; or under Article 6, of the Declaration of Rights of Maryland?

STATEMENT OF FACTS

See the Bill of Complaint in the Appendix, pages 1 to 4; the allegations of the Bill of Complaint are here incorporated by reference.

It is undisputed, under the pleadings in this case, that certain submerged lands under navigable waters of this State in Worcester County, were conveyed by the Board of Public Works of Maryland, to certain real estate developers, for the purpose of filling the lands with mud and other substances, including buyers, so that they would become more or less dry land, and make for the developers millions of dollars.

These lands are, to coin a popular phrase, ecologically valuable, and continued filling of such similar lands in such similar manner, will be, in the long run, economically disastrous to the State and will change the quality of life for Mrs. Kerpelman and other citizens of the State, and of the Class Plaintiffs, traumatically downward, and perhaps diastrously so, if allowed to continue in other instances and in behalf of other potential millionaires, whose economic pressure and political campaign contributions, notoriously outrank those of many individual citizens, but whose cumulative interest in dollars alone, however, not even considering factors which are immeasurable in dollars, does not measure up to the cumulative interest of the citizens-in-common of the State who are represented as Class Plaintiffs in the suit.

ARGUMENT

I

The *Jus Publicum* is Inalienable

The Plaintiff's principle argument is based on the case of *Commonwealth of Virginia vs. City of Newport News* (1932), 164 S.E. 689, at 696.

The theory of that case is as follows, quoting from the case:

“Insofar as the sovereignty and governmental powers of the state are concerned, the object of the ordination of the Constitution is to provide for the exercise thereof *and not the abdication thereof*. It would therefore be a perversion of the Constitution to construe it as authorizing or permitting the Legislature or any other governmental agency to relinquish, alienate, or destroy, or substantially impair the sovereignty, or the sovereign rights, or governmental powers of the state. The police power, the power of right of eminent domain, and the power to make, alter and repeal laws are all attributes or inherent and inseparable incidents of sovereignty and the power to govern. For this reason, although no express provision may be found in a State Constitution forbidding the Legislature to surrender, alienate, abridge, or destroy these powers, there is always such a limitation to be implied from the object and purpose for which the Constitution was ordained. Of course, such sovereign powers must be exercised subject to such limitations upon exercise thereof by the Legislature as are provided in the Constitution.

“When we come to consider the powers of the state Legislature under the Constitution with reference to the *public domain*, it is necessary to take cognizance of the two different basic rights which the state has over and in the public domain.

“*As sovereign, the state has the right of jurisdiction and dominion for governmental purposes over all the lands and waters within its territorial limits, including tidal waters and their bottoms. For brevity this right is sometimes termed the jus publicum. But it also has, as proprietor, the right of private property in all the lands and waters within its territorial limits (including tidal waters and their bottoms) of which neither it nor the sovereign state to whose rights it*

has succeeded has divested itself. This right of private property is termed the *jus privatum*. *Farnum on Waters and Water Rights*, S. 10, S. 36a; *Gough vs. Bell*, 21 N.J.Law, 156; *City of Oakland vs. Oakland, etc. Co.*, 118 Cal. 160, 50 P.277.

“The *jus publicum* and all rights of the people, which are by their nature inherent or inseparable incidents thereof, are incidents of the sovereignty of the state. Therefore, by reason of the objects of purposes for which it was ordained, the Constitution impliedly denies to the Legislature the power to relinquish, surrender, or destroy, or substantially impair the *jus publicum*, or the rights of the people which are so grounded therein as to be inherent and inseparable incidents thereof, except to the extent that the State or Federal Constitution may plainly authorize it to do so. *Farnham on Waters and Water Rights*; S. 10, S. 36a; *Illinois Cent. R. Co. vs. Illinois*, 146 U.S. 387, 455, 13 S.Ct.110, 36 L.Ed.1018; *Gough vs. Bell*, 21 N.J.Law, 156. See, also, Greenleaf’s edition of *Cruise on Real Property*, vol. 2, p.67, note.

“On the other hand, the power of disposition is of the very essence of the proprietary right of the state, its *jus privatum*. Therefore no implication against the exercise by the Legislature of the power or right to alienate and dispose of the lands and waters of the state can arise from the object and purpose, for which the Constitution was ordained, *except such as arises from the existence and inalienability of the jus publicum*.

“From this, however, necessarily arises this limitation. The Legislature may not by the transfer, in whole or in part, of the proprietary rights of the State in its lands and waters relinquish, surrender, alienate, destroy, or substantially impair the exercise of the *jus publicum*. Or, to state it differently, the Legislature may not make a grant of a proprietary right in or authorize, or permit the use of, the public domain, including the tidal waters and their bottoms, except subject to the *jus publicum*. . .

“See also *Illinois Cent. R. Co. vs. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed.1018.”

Emphasis has been supplied throughout for the assistance of this Honorable Court’s efforts.

SUMMARY OF MAIN ARGUMENT

II

A Constitutional Amendment Would Be Necessary to Alienate These Lands

Rights held *jus privatum* then (see above), are alienable, but rights *jus publicum* are part of the sovereignty given over by the people to the state. They cannot be altered by statute, as the Legislature has no right to impair the sovereignty or sovereign rights. Rights of navigation are immemorially included. So, we contend, are rights “environmental” in nature. In either case, submerged lands could not be relinquished, except by CONSTITUTIONAL AMENDMENT by the people.

The English law as it prevailed in 1776 continues to be the law of Maryland, subject however, to the statutes of this State thereafter enacted *subject to Maryland constitutional provisions*. *In re Continental Midway Corp.* 185 F. Supp. 867. The *Newport News Case* is the anchor of this theory—that the *jus publicum* is constitutionally reserved.

III

Amendment Nine, U.S. Constitution

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

IV

Illinois Central v. Illinois

In *Illinois Central Railroad Co. vs. Illinois, supra*, the Court said, at page 1040:

“We shall hereafter consider what rights the company acquired as a riparian owner from its acquisition of title to lands on the shore of the lake, . . .

‘We proceed to consider the claim of the railroad company to the ownership of submerged lands in the harbor, and the right to construct such wharves, piers, docks and other works therein as it may deem proper for its interest in it’s business. The claim is founded upon the third section of the act of the Legislature of this State passed on the 16th of April, 1869, the material part of which is as follows:

“Section 3. (The Illinois Central Railroad Co. is given) . . . all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater . . . (and these) . . . are hereby granted in fee to said Illinois Central Railroad Company, its successors and assigns.”

‘The questions presented relate to the validity of the sections cited of the act . . .

‘. . . As to the grant of the submerged lands, the act declares that all the right and title of the State in and to the submerged lands constituting the bed of Lake Michigan, . . .

“are granted in fee to the railroad company, its successors and assigns”.

‘This clause is treated by the counsel of the company as an absolute conveyance . . . as if they were uplands, in no respect covered or affected by navigable waters, and not as a license to use the lands subject to revocation by the state. Treating it as such a convey-

ance, its validity must be determined by the consideration whether the Legislature was competent to make a grant of this kind . . .

‘The question . . . is whether the Legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; . . .

‘That the state holds title to the lands under the navigable waters of Lake Michigan within its limits, in the same manner that the state holds title to soils under tide water, by the Common Law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are opened to pre-emption and sale. *It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, free from the obstruction or interference of private parties.*

‘The interest of the people in the navigation of the waters, and the commerce over them, may be improved in the instances by the erection of wharves, docks, and piers therein, for which purposes the state may grant parcels of the submerged lands; and so long as the disposition is made for such purposes, no valid objections can be made to the grants . . . And grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjusted cases as a valid exercise of legislative power consistent with the trust to the public upon which such lands are held by the state . . . The trust devolving upon the state or the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can *never* be lost, . . .’

Thus the Maryland statute, by the test of *this* case, if the court chooses to follow this Supreme Court case, is unconstitutional, in allowing the Board of Public Works to dispose of any lands simply for a consideration which it deems to be adequate, when the test must be, under the dictates of this case, whether the alienation will produce *any substantial impairment of the public interest in the lands and waters remaining, regardless of the consideration.*

Continuing, in *Illinois Central vs. Illinois*, at page 1043:

“The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of navigation and use of the waters, parcels can be disposed of without impairment of the public interest in what remains, *than it can abdicate its police powers in the administration of government and the preservation of the peace . . .* So with trusts connected with public property, or property of a special character like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state . . .

“The idea that its Legislature can deprive the state of control over its bed and place the same in the hands of a private corporation created for a different purpose and limit it to transportation of passengers and freight between distant points and the city is a proposition that cannot be defended.”

And quoting Chief Justice Taney (a Marylander yet), the Court went on to say:

“The sovereign power itself, therefore, cannot consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a

grievance which never could be long borne by a free people.

“Many other cases might be cited wherein it has been decided that the bed or soil of navigable waters is held by the people of the state in their character as sovereign in trust for the public uses for which they are adapted. *Martin vs. Waddell*, 41 U.S. 16 . . . (Other citations).”

Then the Court went on to speak of the *jus privatum* and *jus publicum*.

V

The Illinois Central Railroad's Fare Is Reduced for the Trip to Worcester County

All of the above, the Worcester County Court cavalierly dismissed with a wave of the hand and the statement that . . . “Unless the law in force in the State of Maryland in which the Appellate decision has been rendered is identical with that in Maryland, the decision of the foreign jurisdiction, or the interpretation of a federal tribunal based upon the law of that foreign jurisdiction is neither persuasive nor controlling.” (! ! !)

Not Persuasive? Obviously not in Worcester County; controlling—well, does the Supreme Court control in Worcester County? Some think not, some think yes. Some love anarchy, especially in the innocent guise of “conservatism”, and so seems the Honorable Court below.

Then, after dispensing thus of Supreme Court holdings, Judge Prettyman with the wave of his other hand, states that:

“The individual states inherited the sovereignty over lands under navigable waters within the state, and granted unto them (sic) control and regulation of riparian rights, which the states were free to alienate . . .”

were free to alienate according to the constitution and statutes of the respective states.” (Part of this remarkable passage was quoted before.)

It is hard to understand how the proposition can be stood on its head so!

There is, indeed, in *Shively vs. Bowlby*, language slightly similar to that quoted above.

It is the following (at page 58, column 1, of 152 U.S.):

“In common law, the title and dominion in lands flowed by the tide were in the King, for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, *charged with a like trust*, were vested in the original states, within their respective borders, subject to the rights surrendered by the Constitution to the United States.”

Compare also the following in *Illinois Central vs. Illinois*, *supra* at 1042 of 146 U.S.:

“The State holds the title to the lands under . . . navigable waters . . . But it is a title different in character from that which the State holds in lands intended for sale.

“. . . It is a title held *in trust* for the people of the State that they may enjoy the navigation of the waters.”

Illinois too had passed a Statute in derogation of the Common Law!! See p. 1041 of 146 U.S. col. 1 par. 2.

The learned jurist below seems to not understand what “in trust” means. Or perhaps he didn’t see the words there. To err is human, to be an Eastern Shoreman, divine.

The learned Court below stated that in *Shively vs. Bowlby*, it was “determined that the United States had no power to make such a grant, because the Federal Government held the land in trust, pending the formation of a new

state. If one will read the last ten paragraphs of that Opinion, the thrust of the entire Opinion will become most evident.”

One reads, in one of the last ten paragraphs, then, the following:

“Upon the American Revolution, these rights, *charged with a like trust* were vested in the original states. . .”

The trust was similar to that under which the King held the *jus publicum*.

None other.

Not the type of trust under which an Eastern Shoreman holds property from the edge of the Atlantic Ocean all the way across to the banks of the river Clyde.

VIII

Statutes in Derogation of Common Law Strictly Construed

Furthermore, Sutherland on Statutory Construction, 3rd Ed., (1970 Cumulative Supplement), states, in Chapter 62, “Statutes in Derogation of the Common Law”, Section 6201, that:

“Where it is claimed that a statute imposes a duty or burden, or establishes a right or benefit which was not recognized by the common law, the statute will be given a strict interpretation to avoid the change asserted.”

Citing 67 Md. 139, *U.S. Casualty Co. vs. Byrne*.

“This rule of statutory interpretation has received wide adoption, . . .”

Citing Pound, *Common Law and Legislation* (1908), 21 H.L.R. 383. In that article, Professor Pound states:

“The ‘natural rights doctrine’ has been repressed both in England and the United States, but statutes changing the common law, or imposing upon the ‘common right’ have continued to receive a strict construction.”

IX

Constitutional Amendment Necessary

In short, a constitutional amendment would be necessary to allow the state to dispose of land held in the capacity *jus publicum*. A mere statute, such as, Section 15 of Article 78A cannot accomplish this.

The State has given away then, that which was not the State's to give away.

Thus, property of the Appellant, which is owned in common with all other citizens of the State, was taken from her without either amendment of the State Constitution, or any other Due Process of Law required by the Fifth and Fourteenth Amendments to the United States Constitution; rights reserved in her in common with other citizens of the State under the Ninth Amendment to the Constitution of the United States were taken away from her by the action of the Worcester County Court and the Board of Public Works, in taking away this property owned by her, with a commonality of title, together with all other citizens of the State.

Further arguments, it is respectfully suggested, may be found in the “Plaintiff's Memorandum of Law”, which has been filed in the case, but which is far too extensive to reprint here, the Appellant's finances being what they are. Copies for the Court have been filed.

Additional copies may be obtained from counsel for the Appellant at \$2.40 each.

CONCLUSION

Wherefore, the Appellant respectfully prays that the Judgment and Order of the Circuit Court for Worcester County dismissing the case as to all Defendants, on August 31, expanded and amended on September 22, be reversed, and that the case be remanded for further proceedings.

Respectfully submitted,

LEONARD J. KERPELMAN

Attorney for Appellant.

2403 Rogers Building

Baltimore, Maryland 21209

SA 7-8700

APPENDIX

BILL OF COMPLAINT FOR A MANDATORY INJUNCTION, AND FOR DECLARATORY RELIEF

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Now comes Elinor H. Kerpelman, your Complainant, by Leonard J. Kerpelman, her Solicitor, and says:

1. That she is a taxpayer of the State of Maryland, and a resident thereof, in Baltimore City; this suit is brought on her own behalf, and on behalf of all others similarly situated.

2. The Defendant Board of Public Works of Maryland, hereinafter sometimes referred to as "Board of Public Works" or "Board", is charged by law, in Article 78A, Section 15 of the Annotated Code of Maryland, with the authority to dispose of lands of the State of Maryland by sale or otherwise *providing* this is done for "a consideration adequate in the opinion of the Board of Public Works . . ."; but also, by Article 6 of the Declaration of Rights of the Maryland Constitution, the Defendant Board Members, individually are "Trustees of the Public", in all that they do, and must reasonably exercise this fiduciary charge, particularly as to their stewardship of property.

3. In 1968, contrary to said Article 6 Trusteeship, and without the necessary opinion as to adequacy, the Defendant Board of Public Works, then composed in part of different membership, but being the same constitutional and statutory Board as the present Defendant Board, conveyed 190 acres of lands which were then the property of the people of the State of Maryland, unto the Defendant James B. Caine, Inc.; and unto the Defendant Maryland Marine Properties, Inc., 197 acres of Maryland lands; or did so by mesne conveyances both for a totally inadequate and insufficient consideration, compared with the then fair market value or intrinsic value of the said lands, and the said Board then had no opinion upon the monetary adequacy

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of the consideration proffered, or had a mistaken, unreasonable, or totally false opinion of such adequacy, that said conveyances, to the other Defendants respectively were therefore illegal, void, and a nullity as not complying with the necessary precondition set forth as to adequacy in said Art. 78A, Sec. 16; and as a violation of the Trusteeship imposed by Article 6 of the Declaration of Rights. The consideration for the said conveyances was also totally inadequate and insufficient considering the ecological consequences of the sale, and the direct consequent effect upon the natural resources of the State of Maryland, which are owned by the Complainant and all others similarly situated, and which are held in trust for her and the class which she represents in the within suit by the State of Maryland and its public officials including the Defendant Board.

4. The said lands referred to in paragraph 3 hereof, lay in Worcester County, and were marshlands and wetlands, which is to say, submerged and partially submerged lands, marshes, and shallows, peculiarly adapted to the production of certain important forms of marine life, and constituting an important link in the food chain of many economically valuable wild species of fish, animal and bird life, which abound in Maryland, and upon her waters, and which are owned in common, and used by all of the members of the class on whose behalf this suit is brought.

5. Said lands which were conveyed are intended to be, and are being, filled in and built up by those to whom they were conveyed, and their character as wetlands and marshlands is being completely obliterated, with the consequent destruction of support to said fish and animal species aforesaid referred to in paragraph 4.

6. The lands aforesaid which were sold to Maryland Marine Properties, Inc., were sold by an exchange for other marshlands and wetlands, which are cumulatively only one-half as productive of the important species of marine life and products as those which were conveyed to the said Maryland Marine Properties, Inc.; those sold to the defendant James B. Caine, Inc., were sold for a completely

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and totally inadequate money consideration, namely one hundred dollars per acre. Said lands which were sold to Maryland Marine Properties, Inc., were exchanged for wetlands and marshlands as aforesaid worth only \$41,000.00, while the lands conveyed to it were worth two hundred times as much in fair market monetary value; the lands conveyed to James B. Caine, Inc. were worth approximately five hundred times as much in fair market monetary value as the monetary consideration received by the Defendant Board of Public Works.

7. Said monetary consideration paid to Maryland was, in each case, so completely and totally inadequate as was known to all parties at that time as to amount to a conveyance of the land by the Defendant Board of Public Works fraudulently, or by mistake, or by undue influence exerted upon it.

8. The Complainant and all other similarly situated, will be irreparably injured and damaged and have been so, by the said conveyances to the defendants, Maryland Marine Properties, Inc., and James B. Caine, Inc., in that valuable property, which is ecologically irreplaceable, owned by them or held in trust for them by the Defendant Board of Public Works, has been disposed of, and closed off to the wild natural resource cycle which it was a most essential, irreplaceable part of, and the Complainant and all others similarly situated are deprived of their use and benefit, which they otherwise would have, in return for a totally inadequate consideration and in return for a totally inadequate contribution by new owners of the said lands into the state treasury by way of real estate taxes paid and to be paid, the value of which taxes will never compensate for the deprivation of said lands and the irreparable damage and injury which will be caused to the natural products and natural resources of the State of Maryland by the ecological disruption caused by the filling and loss of said wetlands, marshlands and shallows; which disruption may reasonably be expected to cause or substantially contribute to, natural resource and wildlife losses of many millions of dollars measured in financial terms alone.

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9. The Defendant corporations and proceeding with great speed to fill in and eradicate as marshland and wetland, the lands in question.

10. The Complainant has no adequate remedy at law.

WHEREFORE, the Complainant prays:

(a) That this case be advanced on the Court Docket for immediate trial, and hearing on any motions which may be filed.

(b) That a Mandatory Injunction may issue, requiring the Defendants, Maryland Marine Properties, Inc., and James B. Caine, Inc., to reconvey to the State of Maryland, those lands in Worcester County, which are the subject of the within suit.

(c) That the Court declare the Deeds of Conveyance or mesne Deeds of Conveyance made by the Board of Public Works of Maryland of lands in Worcester County, Maryland, unto Maryland Marine Properties, Inc., and James B. Caine, Inc., which conveyances were made in 1968, of 197 acres and 190 acres, respectively, more or less, to be null, void, and of no effect, and that title remains in the People of Maryland.

(d) That the Complainant may have such other and further relief as the nature of her case may require.

AND, AS IN DUTY BOUND ET CETERA.

LEONARD J. KERPELMAN,
Attorney for Complainant
500 Equitable Building
Baltimore 2, Maryland
SA 7-8700

ELINOR H. KERPELMAN

DEMURRER OF DEFENDANT MARYLAND
MARINE PROPERTIES, INC.

Defendant, Maryland Marine Properties, Inc., by its attorneys, Raymond D. Coates, Thomas P. Perkins III and Robert A. Shelton, demurs to the Bill of Complaint filed by

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Plaintiff, Elinor H. Kerpelman, herein and to each and every paragraph thereof and as grounds for said Demurrer states as follows:

1. Plaintiff has totally failed to allege any facts which would be sufficient to constitute a cause of action or entitle her to the relief as prayed in the Bill of Complaint.
2. Plaintiff has totally failed to allege sufficient facts to establish her standing to sue in this case.
3. Plaintiff is barred by laches.
4. Such other and further grounds as will be set forth at the hearing on this Demurrer.

WHEREFORE, Defendant, Maryland Marine Properties, Inc., prays that this Honorable Court sustain its Demurrer without leave to amend, that the Bill of Complaint be dismissed as against Defendant, Maryland Marine Properties, Inc. and that Defendant be awarded its cost of this suit.

/s/ Raymond D. Coates
/s/ Thomas P. Perkins, III
/s/ Robert A. Shelton

MOTION NE RECIPIATUR TO DEMURRER OF
MARYLAND MARINE

The said "Demurrer", and paragraph number 3 thereof, states "Plaintiff is barred by laches"; the defense of "laches", is a factual defense, and has no proper place in a demurrer; the Plaintiff being confronted by a demurrer containing such material knows not how to meet the matter to be presented upon argument or briefing, and is unable therefore to reasonably prepare for the presentation of his defense to the demurrer.

LEONARD J. KERPELMAN
Attorney for Plaintiff

DEMURRER OF BOARD OF PUBLIC WORKS

The Board of Public Works, a Defendant, by Francis B. Burch, Attorney General, Jon F. Oster, Assistant Attorney General, and Richard M. Pollitt, Special Attorney, its attorneys, demurs to the Bill of Complaint and to each and every paragraph thereof because:

1. The Bill does not state a cause of action.
2. The Bill does not allege facts amounting to a cause of action.
3. The Bill does not allege facts sufficient to support the relief prayed.
4. Article 78A, Section 15 of the Annotated Code of Maryland (1965 Replacement Volume) provides:

“Any real or personal property of the State of Maryland or of any board, commission, department or agency thereof, and any legal or equitable rights, interests, privileges or easements in, to, or over the same, may be sold, leased, transferred, exchanged, granted or otherwise disposed of to any person, firm, corporation, or to the United States, or any agency thereof, or to any board, commission, department or other agency of the State of Maryland for a consideration adequate in the opinion of the Board of Public Works, or to any county or municipality in the State subject to such conditions as the Board of Public Works may impose. If said real or personal property of the State of Maryland, disposed of hereunder, or any legal or equitable rights, interests, privileges or easements in, to, or over the same is under the jurisdiction or control of any board, commission, department or other agency of the State, the deed, lease or other evidence of conveyance of any such property or right or interest therein, disposed of hereunder, shall be executed on behalf of such board, commission, department or agency of the State, by the highest official thereof, and by the Board of Public Works, and if any of said real or personal property or any legal

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or equitable rights, interests, privileges or easements in, to, or over the same, disposed of hereunder, is not under the jurisdiction or control of any particular board, commission, department or other agency of the State, the deed, lease or other evidence of conveyance of said property or interest therein shall be executed by the Board of Public Works only; provided, however, that whenever any State department, agency or commission leases State-owned property under its jurisdiction and control to any State employee, agent, servant or other individual in State service for purposes of permitting such person to maintain a residence therein, such lease shall be executed by the department, agency or commission having such control or jurisdiction over such property, and, additionally, shall be approved by the budget Director, which approval shall be a condition precedent to the validity of the lease. All such conveyances shall be made in the name of the State of Maryland acting through the executing authority or authorities herein provided for. As used herein, the term 'real or personal property or any legal or equitable rights, interests, privileges or easements in, to, or over the same, shall include the inland waters of the State and land under said waters, as well as the land underneath the Atlantic Ocean for a distance of three miles from the low watermark of the coast of the State of Maryland bordering on said ocean, and the waters above said land. If the consideration received for the disposition of any real or personal property or interest therein is other real or personal property, such property so received shall be held and accounted for in in the same manner as other property within the jurisdiction and control of the board, commission, department or other agency of the State receiving such property. If the consideration received for any such disposition is cash, in whole or in part, the proceeds shall be accounted for and remitted to the State Treasurer; except that any consideration received in cash for the disposition of an asset of a substantial per-

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manent nature, commonly called a capital asset, shall be applied solely to the State Annuity Bond Fund Account for the payment of the principal and interest of the bonded indebtedness of the State and if such capital asset shall have been originally purchased with any special funds, the proceeds thereof shall revert to such fund only.”

Said statute imposes no limitation upon the power of the Board of Public Works to dispose of the property which is the subject of this suit, and the Board was authorized as a matter of law to dispose of the property complained about.

5. There is no allegation that the alleged alienation of State property was not “for a consideration adequate in the opinion of the Board of Public Works” as provided in the statute.

6. There is no allegation that the procedure of the Board of Public Works in connection with its disposition of the subject property was improper, defective or in any manner contrary to law.

7. The exercise of discretion of an administrative agency, if it acts within the scope of its authority, is not subject to review by a court of equity unless its power is fraudulently or corruptly exercised. *Hanna v. Bd. of Ed. of Wicomico Co.*, 200 Md. 49.

8. And for other reasons to be shown at the hearing of this Demurrer.

FRANCIS B. BURCH
Attorney General
JON F. OSTER
Assistant Attorney General
RICHARD M. POLLITT
Special Attorney
Attorneys for Defendant
Board of Public Works

MOTION RAISING PRELIMINARY OBJECTION

James B. Caine, Inc., one of the Defendants, by Sanford and Bolte, its Solicitors, moves this Court pursuant to Rule 323 (A) (1) of the Maryland Rules for an Order dismissing the Bill of Complaint filed herein and as grounds for this Motion alleges that this Court lacks jurisdiction over the subject matter of said Bill of Complaint, since it involves a political question and not a justifiable question.

SANFORD AND BOLTE

ANSWER TO MOTION RAISING
PRELIMINARY OBJECTION

Now comes Elinor H. Kerpelman, by Leonard J. Kerpelman, her solicitor and for answer to Motion Raising Preliminary Objection, says:

1. That questions raised by the Bill of Complaint are, substantially, two:
 - A. The Board of Public Works of Maryland alleged to convey lands which it had no alienable title to, to the other Defendants.
 - B. The conveyance was for such a completely and totally inadequate consideration, that the Board of Public Works could not have had a bona fide opinion that the consideration was adequate, and therefore fraud is inferred by the Complainant.
2. It is not seen how, in any sense A, could be said to be a political question by any stretch of any except of most fertile imagination question B could be so; however, it is denied, to be perfectly clear and explicit, that either is a "political question".

LEONARD J. KERPELMAN
Attorney for Complainant

MOTION FOR SUMMARY JUDGMENT UPON
SOME ISSUES

Now comes Elinor H. Kerpelman, Plaintiff, by Leonard J. Kerpelman, her Attorney, and says:

That there is no dispute as to any material fact concerning the following issues in the above-entitled case:

- a. That she is a taxpayer of the State of Maryland.
- b. That she is a resident thereof in Baltimore City.
- c. That this suit is brought on her own behalf, and on behalf of all others similarly situated.

LEONARD J. KERPELMAN
Attorney for Plaintiff

DEMURRER OF DEFENDANT JAMES B. CAINE, INC.

James B. Caine, Inc., one of the Defendants, by Sanford and Bolte, its attorneys, demurs to the Bill of Complaint filed herein and to each and every paragraph thereof, and as grounds for said Demurrer states as follows:

1. Plaintiff has totally failed to allege any facts which would be sufficient to constitute a cause or action or entitle her to the relief as prayed in the Bill of Complaint.
2. Plaintiff has totally failed to allege sufficient facts to establish her standing to sue in this case.
3. Plaintiff is barred by laches.

In support of said Demurrer, this Defendant adopts the arguments heretofore made by the other Defendants herein, and also the Opinion of this Honorable Court relating to such Demurrers, which is dated August 31, 1970 and filed in this proceeding.

WHEREFORE, Defendant James B. Caine, Inc. prays this Honorable Court to sustain its Demurrer without leave to amend, to the end that the Complainant pay the costs of this proceeding.

SANFORD AND BOLTE

OPINION AND ORDER OF COURT [AUG. 31, 1970]

This is another one of those cases in which rulings required upon pleadings now before the Court for determination can obscure the principal issue presented to the Court at the time of the Hearing on the pleadings on May 11, 1970.

On September 30, 1969, the Complainant filed a "Bill of Complaint For A Mandatory Injunction, And For Declaratory Relief". Upon the reading of the Bill, however, and the prayers for relief, it becomes apparent that the complaint does not actually state a typical cause of action as usually embraced in a petition for a declaratory decree or declaratory judgment. In other words, the Bill does not actually seek a declaration of rights of the parties, but seeks the specific relief as requested in the said prayers, the contents of which follow:

"WHEREFORE, the Complainant prays:

- (a) That this case be advanced on the Court Docket for immediate trial, and hearing on any Motions which may be filed.
- (b) That a Mandatory Injunction may issue, requiring the Defendants, Maryland Marine Properties, Inc., and James B. Caine, Inc., to reconvey to The State of Maryland those lands in Worcester County which are the subject of the within suit.
- (c) That the Court declare the Deeds of Conveyance or Mesne Deeds of Conveyance made by the Board of Public Works of Maryland of lands in Worcester County, Maryland, unto Maryland Marine Properties, Inc., and James B. Caine, Inc., which conveyances were made in 1968, of 197 acres and 190 acres, respectively, more or less, to be null, void, and of no effect, and that title remains in the People of Maryland."

To this Bill of Complaint, the Defendant Maryland Marine Properties, Inc. filed its Demurrer on October 20, 1969, together with an extensive memorandum raising three

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specific issues; namely, (1) a failure to allege sufficient facts to constitute a cause of action, (2) attacking the standing to sue of the Plaintiff, and (3) raising the question of laches. On October 21, 1969, the Defendant Board of Public Works filed its Demurrer citing the provisions of Section 15 of Article 78A of The Annotated Code of Maryland, and the authority of the Board of Public Works of Maryland as therein set forth, contending that, in the absence of any allegation of fraud or the facts supporting such an allegation, no cause of action was sufficiently stated to subject the actions of the Board of Public Works to the scrutiny of a Court of Equity.

On October 21, 1969, James B. Caine, Inc., one of the Defendants, filed a "Motion Raising Preliminary Objection", alleging the lack of jurisdiction of this Court over the subject matter of the Bill, on the grounds that a determination involved a "political question", and "not a justiciable question".

On November 6, 1969, the Complainant filed a "Reply To 'Memorandum of Law of Maryland Marine In Support of Demurrer'".

On November 7, 1969, the Complainant filed a "Motion Ne Recipiatur To Demurrer Of Maryland Marine", based upon contention that the Demurrer raised a question of laches which should be considered as a factual defense rather than a subject of a demurrer.

On November 17, 1969, the Complainant filed an "Answer To Motion Raising Preliminary Objection", denying the nature of the question to be "political", and summarizing the contentions of the Bill as being (a) that the Board of Public Works enjoyed no alienable title to the lands in question, (b) that "[t]he conveyance was for such a completely and totally inadequate consideration, that the Board of Public Works could not have had a bona fide opinion that the consideration was adequate, and therefore fraud is inferred by the Complainant".

On January 26, 1970, an organization allegedly known as "North American Habitat Preservation Society" filed a

“Petition To Intervene As Plaintiffs”, upon which the Court issued a Show Cause Order to the Defendants ordering them to show cause on or before February 16, 1970, if any they had, why the said Petition to Intervene should not be granted. The Defendant Maryland Marine Properties, Inc., filed its Answer to the Petition to Intervene, on February 24, 1970, alleging insufficient facts to establish the standing of the Petitioners to sue. On February 27, 1970, the Defendant, James B. Caine, Inc., filed a “Motion Ne Recipiatur As To Petition To Intervene As Plaintiffs”, alleging the non-receipt of a copy of the said Petition, the existence of which the attorney for the said Defendant allegedly accidentally discovered in the office of the Clerk of this Court, on February 24, 1970.

On March 11, 1970, the Complainant filed a “Motion Ne Recipiatur” to the Motion Ne Recipiatur of the Defendant James B. Caine, Inc., founded upon the grounds that the Caine Motion was based upon “facts not apparent from the face of the record, and yet was not under affidavit”. Interestingly enough, no copy of the Complainant’s Motion Ne Recipiatur was apparently served upon the Defendant James B. Caine, Inc., or any of his attorneys until May 13, 1970, after which an amended certificate of mailing was apparently intended to be filed by the attorney for the Complainant on March 16, 1970.

On May 5, 1970, the Plaintiff filed a Memorandum of Law, the main body of which was a photo-copy of a memorandum filed, on September 15, 1969 in a similar case in the Circuit Court for Baltimore City.

On May 6, 1970, the Defendant James B. Caine, Inc., filed a “Memorandum In Support Of Preliminary Objection”, the main body of which was a photo-copy of a brief filed in the same similar case in the Circuit Court for Baltimore City.

On May 11, 1970, the Complainant filed a “Motion For Summary Judgment Upon Some Issues”, alleging “no dispute as to any material fact concerning the following issues”; namely, (a) [t]hat she is a taxpayer of the State of Maryland, (b) [t]hat she is a resident thereof in Balti-

more City, and (c) [t]hat this suit is brought on her own behalf, and on behalf of all others similarly situated.”

The Hearing was held on May 11, 1970 on all Demurrers, Motions, Petitions, etc., consistent with the notice of the assignment thereof mailed to all parties on April 8, 1970.

On May 15, 1970, the Complainant filed as “Answer To Memorandum Of Law Of Defendant James B. Caine, Inc.”, in which the Complainant suggested that “counsel has missed the point”, because of the contention of the Complainant that “nobody” has an alienable title to the lands in question.

On June 17, 1970, the Complainant filed a “Supplementary Plaintiff’s Memorandum Of Law”, in which the Complainant stated to the Court that she was adopting the entire theory set forth in the case of Commonwealth of Virginia vs. City of Newport News, 164 S.E. 689, at page 696, and quoted from that case the theory upon which she relied.

Petition to Intervene

The first duty of the Court is obviously to dispose of the Petition to Intervene filed on behalf of the “North American Habitat Preservation Society”, for whom Leonard J. Kerpelman, Esq. is “solicitor” as well as being the attorney for the Complainant. Based entirely upon the facts set forth in the said Petition as to the nature and composition of the said Society, and the interest which it has in this case, the Court has determined that it lacks standing to sue as a party Plaintiff, and therefore its Petition to Intervene would be denied. Horace Mann League vs. Board, 242 Md. 645, at page 652. Citizens Committee vs. County Commissioners, 233 Md. 398, Bar Association vs. District Title Co. 224 Md. 474, and Greenbelt vs. Jaeger, 237 Md. 456.

A certain R. Doyle Grabarck, Box 869, Adelphi, Maryland, 20783, has likewise joined as a Petitioner in the said Petition to Intervene, both as President of the said Society, and individually. As President of the Society, the Court would consider his capacity to sue to be co-existent with the Society, and of no greater magnitude. As an individual,

however, he is apparently in the same position as the Complainant, Elinor H. Kerpelman, and the determination as to her standing will likewise be determinative of the standing of Mr. Grabareck. It seems also to follow that a determination of the contentions and issues raised by the Complainant would likewise be determinative of the contentions and issues raised by Mr. Grabareck, particularly in view of the fact that each are represented by Mr. Kerpelman. Indeed, by paragraph 4 and 5 of the Petition to Intervene, the Petitioners have so stated, and have adopted the position of the Complainant. There is one major difference, however, between the Petitioner Grabareck and the Complainant Kerpelman. That difference is the fact that nowhere in the Petition to Intervene is it alleged that Mr. Grabareck is a taxpayer of the State of Maryland. The Petition to Intervene, therefore, by R. Doyle Grabareck, as an individual, will be, likewise, denied.

Motions Ne Recipiatur

The determination by the Court upon the Petition to Intervene, as hereinbefore set forth, makes unnecessary a consideration of the Motion Ne Recipiatur filed by the Defendant James B. Caine, Inc., or the Motion Ne Recipiatur filed by the Complainant to the Caine Motion Ne Recipiatur. It might be well for the Court to observe, however, that Counsel for the Complainant had due notice of the appearance of Lee W. Bolte, Esq., and the firm of Sanford and Bolte, on behalf of the Defendant James B. Caine, Inc., as early as October 21, 1969, upon the filing of the Caine Motion Raising Preliminary Objection. Mr. Kerpelman recognized this appearance in his service of November 4, 1969 of his "Reply", his Motion filed on November 7, 1969, and his Answer filed on November 17, 1969. He did ignore the appearance in his service of the said Petition to Intervene. The apparent failure of Counsel for Maryland Marine Properties, Inc., to receive a copy of the said Petition to Intervene is the fact that Mr. Kerpelman used an inadequate address therefor, according to his Certificate of Service, in that he omitted any reference to room numbers. The Clerk of this Court can hardly be held responsible for this

defect in view of the fact that in his undated Certificate of Service of the said Petition to Intervene, Mr. Kerpelman alleged service upon a certain "Joseph H. Young, Esq., 901 First National Bank Bldg., Baltimore, attorney for James B. Caine, Inc." The Clerk would have no way of knowing whether or not additional Counsel for the Caine Corporation was now in the case, and had simply failed to enter his appearance in record. Perhaps the Clerk, however, should be more careful, and require that the Certificate of Service by an attorney be dated, and that all attorneys of record be included within such Certificate.

Motion Raising Preliminary Objection

The Court should then next consider the preliminary objection raised by the Defendant James B. Caine, Inc., upon the question of whether or not the Bill of Complaint merely stated a political question, and not a justiciable issue. Granting that a reading of the Bill of Complaint would make it difficult to delineate a justiciable issue, and that the Bill appears to be more in the nature of a statement of a political position, requiring legislative attention or executive restraint, the memoranda subsequently filed on behalf of the Complainant have had the salutary effect of interpreting the meaning of the Bill of Complaint and articulating a position which presents a legal issue. In view of this subsequent elucidation, by counsel for the Complainant, the Court will entertain jurisdiction, and render a decision upon the issue as narrowly framed and presented to the Court by Complainant's Memoranda. The Motion of the Defendant James B. Caine, Inc., raising this preliminary objection will be overruled.

*Motion Ne Recipiatur of Complainant to
Demurrer of Maryland Marine
Properties, Inc.*

The Court will entertain the Demurrer of the Defendant Maryland Marine Properties, Inc., and deny the Motion Ne Recipiatur filed thereto by the Complainant. In his Motion Ne Recipiatur thereto, Counsel for the Complainant

has over simplified the law with regard to the inclusion of a charge of laches in a demurrer.

“The defense of limitations or laches may be raised on demurrer where, on the face of the bill, it can be seen that it is a bar. Although, ordinarily, the defense of laches must be made by answer alleging facts showing lapse of time and prejudice to the Defendant, as discussed supra §142, where the bill on its face shows both lapse of time and circumstances as suggest prejudice or acquiescence and call for explanation, the bill is demurrable.” 9 M. L. E. “Equity”, Section 152, and cases therein cited, including the 1969 Pocket Part.

The Court will concede that the question of whether or not a case of laches is presented within the four corners of the Bill of Complaint is indeed a close one, but if the question of laches was the only question before the Court for determination in this proceeding at this time, the Court would insist upon a Hearing to spread the facts upon the record, particularly as they relate to prejudice to the Defendant Maryland Marine Properties, Inc. The Court, therefore, would take the position that it would not sustain the Demurrer on that grounds alone, but defer it as a matter of defense. Such a position by the Court, however, does not dispose entirely of the matter now for determination. The fact that a demurrer contains an invalid, unsupported or otherwise irrelevant issue, or the fact that the grounds assigned do not meet the approval of counsel for the opposing party or the Court does not justify the rejection of the pleading in toto. Even if one of the grounds assigned in a demurrer is found to be lacking in legal efficacy, the remaining grounds, if any there be, survive and are entitled to the consideration of the Court. Such is the situation presented here.

Demurrers

The Court is well aware of, and has had several opportunities to apply, the position of the Court of Appeals of Maryland with regard to demurrers filed in opposition to petitions for declaratory relief. *Kelley vs. Davis*, 233 Md.

494. As mentioned early in this Opinion, however, this Court does not envision the Bill of Complaint in this case to state the grounds for, or the request for, a declaration of the rights of the parties. The declaration which the Complainant seeks is merely a declaration to support the issuance of the "Mandatory Injunction" which she prays. In other words, it would be necessary to "declare" invalid the conveyances referred to within the Bill and in prayer for relief "(c)" in order to grant the relief prayed in "(b)" of the prayers for relief. There is no basis for, or necessity for, any other, further, or fuller declaration of rights of the parties. The Court is, therefore, of the opinion that the rule against entertaining a demurrer to a petition for declaratory relief is not appropriate to this particular proceeding, and should not be applied hereto.

The Court will attempt to state the position of the Complainants insofar as it presents a legal issue to be resolved herein. The Complainant adopts the position that title to lands under tidal waters vested in the King of England, for the benefit of the nations, passed to the Colonies under the Royal Charters granted therefor, in trust for the communities to be established, and upon the American Revolution, passed to the original States to be held by the officials thereof in trust for the people within the boundaries of the respective States, subject only to the rights surrendered by the Constitution of the United States to the Federal Government for the regulation of navigation. The trust which she envisioned is one which covers the entire *jus publicum* and vests in the trustee an irrevocable and inalienable title to such property. In support of her position in regard to such a trust, she narrowly construes the first portion of Article 6 of the Declaration of Rights of the Constitution of Maryland, of 1867, which reads:

"Art. 6. That all persons invested with the Legislative or Executive powers of Government are the Trustees of the Public and, as such, accountable for their conduct: . . ."

She is further contending that such being the alleged common law of England, the General Assembly of Maryland, or apparently any Provincial legislature, is not, and

never has been, empowered or authorized to change or modify that common law. As authority for that provision, she cites a portion of the content of Article 5 of the Declaration of Rights of the Constitution of Maryland, of 1867, the portion which she cites being as follows:

“Art. 5. That the Inhabitants of Maryland are entitled to the Common Law of England, . . .”

At this point, perhaps it would be well that the Court quote the remainder of Article 5 of the Declaration of Rights, with the emphasis by underlining being supplied by the Court:

“Art. 5. That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English Statutes as existed on the Fourth day of July, 1776; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, 1867; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; *subject, nevertheless, to the revision of, an amendment or repeal by, the Legislature, of this State.* And, the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by His Majesty Charles I to Caecilius Calvert, Baron of Baltimore.”

There is no substantial difference between that portion of the 1867 Constitution of Maryland and paragraph 3 of the Declaration of Rights of the First Constitution of Maryland, as reported by Kilty, Volume 1, The Laws of Maryland 1799 Edition. It reads as follows:

“III. That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by jury according to the course of that law, and to the benefit of such of the English statutes as existed at the time of their first emigration and which by experience have been found applicable to their local and other circumstances, and of such others as have been since

made in England or Great Britain, and have been introduced, used and practiced by the Courts of Law or Equity; and also to all acts of assembly in force on the first of June, 1774, except such as may have since expired, or have been, or may be altered by acts of convention, or this declaration of rights; *subject nevertheless to the revision of, and amendment or repeal by, the Legislature of this State*: and also the Inhabitants of Maryland are also entitled to all property derived to them from or under the charter granted by His Majesty Charles I to Caecilius Calvert, Baron of Baltimore.’’

If, as Counsel for the Complainant has stated in his Supplementary Memorandum, the Court was impatient at the Hearing with the persistent argument of Counsel with regard to the elements of the Common Law doctrine, perhaps it was because of the clear exception in the Declaration of Rights as hereinbefore set forth, and the almost incontestable legal understanding that the Legislature of Maryland is at liberty, and in the conscientious performance of its duties, must, from time to time, change the Common Law through statutory enactments in order to meet the changing conditions of time and history. *Lutz vs. State* 167 Md. 12, *Heath vs. State*, 198 Md. 455, *Goldenberg vs. Federal Finance*, 150 Md. 298, 5 M.L.E. “Common Law”, Section 3. The adoption of any proposition that would abrogate, nullify and destroy the great body of law in Maryland, including enactments of the General Assembly, except so much thereof as interpreted and applied the Common Law of England prior to 1776 and the treatment of subjects not contemplated by that common law, is so illogical, unreasonable, and disastrous in its consequences as to be almost incomprehensible. The Court supposes that this is the reason why the point had not been more frequently pressed upon the Courts of this State in the past.

The Court is indebted, however, to Counsel for the Complainant for urging upon the Court the controlling nature of the opinion of the Supreme Court of the United States in *Shively vs. Bowlby*, 14 Sup. Ct. 548, 152 U. S. 1. The Court willingly and delightedly adopts the decision therein to be

determinative of the issues presented by the Complainant for resolution in this proceeding. Unfortunately, Counsel for the Complainant has misread the case, and has appropriated wording from that case, out of context, to attempt to support the position of the Complainant herein.

That case establishes the proposition that, consistent with the Common Law of England, the individual States inherited the sovereignty over lands under navigable waters within the State, and granted unto them control and regulation of riparian rights, which the States were free to alienate according to the constitution and statutes of the respective States. In a most helpful and extensive treatment of the entire subject matter of riparian rights as they existed within the original thirteen states, and as, by virtue of that opinion, extended to the new states admitted into the Union thereafter, the Supreme Court, in *Shively vs. Bowlby*, has furnished a source of history of the treatment of riparian rights of enormous magnitude, and through its study, one is oriented to the broad spectrum, and range of treatment, of the subject by the individual States. This concept is fundamental if one is to now attempt to define and understand riparian rights within the United States. Available treaties, encyclopedic compendiums, and conclusions based upon summaries of annotations must be read and considered in the light of the cardinal principle that the decisions of the individual states are based upon the law as it had been established within the individual states, and unless the law in force in the State in which the appellate decision has been rendered is identical with that in Maryland, the decision of the foreign jurisdiction, or the interpretation of a federal tribunal based upon the law of that foreign jurisdiction, is neither persuasive nor controlling.

If the strict trust theory proposed by the Complainant is the law in other jurisdictions, it is certainly not the law in Maryland. Without belaboring the issue with repetition of authorities recently enumerated and discussed by this Court in No. 8935 Chancery, the Court would merely observe that, beginning with the Acts of 1745 and continuing through the Acts of 1970, the Legislature of Maryland has recognized the existence of certain riparian rights in pri-

vate land owners. A long line of judicial decisions of the Court of Appeals of Maryland and Federal Courts interpreting Maryland Law, have protected, enforced, interpreted and arbitrated these rights, beginning, at least, in 1815, with *The Wharf Case*, reported in 3 Bland at page 361, and continuing through *Causey vs. Gray*, in 1968, reported in 250 Md. at page 380, and through November 12, 1969, in *Western Contracting Corporation vs. Titter*, reported in 255 Md. at page 581.

The most specific pronouncement of the General Assembly of Maryland, however, upon the narrow issue sought by the Complainant to be raised against The Board of Public Works of Maryland is contained in Section 15 of Article 78A of The Annotated Code of Maryland. Without quoting that lengthy section in full in this Opinion, since 1945, The Board of Public Works of Maryland has been granted specifically the following power:

“Any real or personal property of the State of Maryland or of any Board, Commission, Department or Agency thereof, and any legal or equitable rights, interests, privileges or easements, in, to, or over the same, may be sold, leased, transferred, exchanged, granted or otherwise disposed of to any person, firm, corporation, or to the United States, or any agency thereof, or to any Board, Commission, Department or other agency of the State of Maryland for a consideration adequate in the opinion of the Board of Public Works, or to any county or municipality in the State subject to such conditions as The Board of Public Works may impose . . . As used herein, the term ‘real or personal property or any legal or equitable rights, interests, privileges for easements in, to, or over the same’ shall include the inland waters of the State and land under said waters, as well as the land underneath the Atlantic Ocean for a distance of three miles from the low watermark of the coast of the State of Maryland bordering on said ocean, and the waters above said land . . .”

The language which Counsel for the Complainant has selected from *Shively vs. Bowlby* with regard to the imposi-

tion of a trust does not apply to the type of trust which the Complainant espouses. The factual situation in *Shively vs. Bowlby* presented the issue as to whether or not a purported grant from the United States of America, while the area was a territory under the jurisdiction of the Federal Government, took precedence over a grant by the State of Oregon for the same land. The Court determined that the United States had no power to make such a grant because the Federal Government held the land in trust pending the formation of the new State. If one will read the last ten paragraphs of the Opinion, the thrust of the entire opinion will become most evident. The type of trust referred to therein bears no resemblance to the type of trust here urged upon the Court.

The pleadings, memoranda, and arguments in this case have been filled with references to various possible disastrous consequences by the adoption of the position of one party or the other. The Court refuses to speculate, and does not base this Opinion upon any unproven allegations, either favorable or unfavorable to the Complainant, but, if one had the time, it might be an interesting mental exercise to conceive of replacing the shorelines of The State of Maryland to their composition and contour, and in all their pristine beauty, of the year 1634. Such would be the logical, if unreasonable, result should the theory of the Complainant be adopted, and the requested "Mandatory Injunction" issued by this Court.

Adapting, as she has, the theory of her cause of action, the Court can see no reasonably possible manner in which the Bill of Complaint can be amended to avoid its basic infirmity, nor any need for any further delay in granting an opportunity for such an amendment.

Having reached this decision in the matter, it becomes unnecessary to consider the standing of the Complainant to sue.

It is, therefore, this 31st day of August, 1970, by the Circuit Court for Worcester County, Maryland, ORDERED that:

App. 24

1. The Petition to Intervene as Plaintiffs filed by the "North American Habitat Preservation Society" and R. Doyle Grabarek, President, and Individually, on January 26, 1970, is DENIED;
2. The Motion Ne Recipiatur filed by Defendant James B. Caine, Inc., to the said Petition to Intervene as Plaintiffs, on February 27, 1970, is DENIED;
3. The Motion Ne Recipiatur filed by Complainant to the said Motion Ne Recipiatur filed by the Defendant James B. Caine, Inc., on March 11, 1970, is DENIED;
4. The Motion Raising Preliminary Objection filed by the Defendant James B. Caine, Inc., on October 21, 1969, is DENIED;
5. The Motion Ne Recipiatur filed by Complainant to Demurrer of the Defendant Maryland Marine Properties, Inc., on November 7, 1969, is DENIED;
6. The Demurrer of Defendant Maryland Marine Properties, Inc., to the Bill of Complaint, filed on October 20, 1969, is SUSTAINED, without leave to the Complainant to amend;
7. The Demurrer of Defendant Board of Public Works to the Bill of Complaint, filed on October 21, 1969, is SUSTAINED, without leave to the Complainant to amend; and
8. The "Motion of Complainant for Summary Judgment Upon Same Issues" filed by the Complainant on May 11, 1970, being more in the nature of a Demand for Admission of Facts, (which would have been a more appropriate Pleading) is GRANTED, the facts therein having been conceded in the absence of any response thereto by the Defendants; and
9. The Complainant shall pay the costs of this proceeding.

DANIEL T. PRETTYMAN,
Judge

TRUE COPY, TEST: Frank W. Hales, Clerk

DOCKET ENTRIES

1969, Sept. 30. Bill of Complaint for a Mandatory Injunction, and for Declaratory Relief and Interrogatories to the Defendant Board, filed.

1969, Sept. 30. Subpoena with copies issued, together with copies of Bill of Complaint for a Mandatory Injunction, and for Declaratory Relief and Interrogatories to the Defendant Board attached and mailed to the Sheriff of Baltimore City and delivered to the Sheriff of Worcester County for service.

“Summoned James B. Caine, Inc., by service upon James B. Caine and Maryland Marine Properties, Inc., by service upon Raymond D. Coates severally by leaving with each of them a copy of the Writ, together with Bill of Complaint for Mandatory Injunction and a Declaratory Relief Interrogatories to the Defendant Board attached this 30th day of September, 1969. So ans.”
R. Calvin Hall, Sheriff, By: James N. Jarman, Deputy Sheriff.

“Non Est as to Hon. Marvin Mandel, Governor”, J. Mufken, Frank J. Pelz, Sheriff.

“Copy of the Process with a copy of Bill of Complaint served on Francis B. Burch, Esq., Attorney General of Maryland at One Charles Center, at 2:05 P.M. on the first day of October, 1969, in the presence of Sol Damoff”, Frank J. Pelz, Sheriff.

1969, Oct. 9. Second Subpoena with copy issued, together with a copy of Bill of Complaint for a Mandatory Injunction and for Declaratory Relief and Interrogatories to the Defendant Board attached and mailed to the Sheriff of Baltimore City for service on the Governor.

1969, Oct. 20. Demurrer of Defendant, Maryland Marine Properties, Inc., and Certificate of Service thereon, filed.

App. 26

- 1969, Oct. 20. Memorandum of Law of Defendant, Maryland Marine Properties, Inc., in Support of Demurrer, filed.
- 1969, Oct. 21. Demurrer of Defendant Board of Public Works and Certificate of Service thereon, filed.
- 1969, Oct. 21. Motion Raising Preliminary Objection, Request for Hearing and Certificate of Service thereon, filed.
- “Summoned Honorable Marvin Mandel, Governor, and a copy of the process with a copy of the Bill of Complaint left with the defendant at 301 W. Preston St., at 12:30 P.M. on the 27 day of October, 1969 in the presence of John Nuller, III”, Frank J. Pelz, Sheriff.
- 1969, Nov. 6. Reply to “Memorandum of Law of Maryland Marine in Support of Demurrer” and certificate of service thereon, filed.
- 1969, Nov. 7. Motion Ne Recipiatur to Demurrer of Maryland Marine. Memorandum of Authorities and Certificate of Service thereon, filed.
- 1969, Nov. 17. Answer to Motion Raising Preliminary Objection, Memorandum of Authority and Certificate of Service thereon, filed.
- 1970, Jan. 26. Petition to Intervene as Plaintiffs, Affidavit, and Certificate of Service thereon, filed.
- 1970, Jan. 26. Unsigned Order to Show Cause, filed.
- 1970, Jan. 26. Order to Show Cause filed. Copies of Petition, Affidavit and Show Cause Order mailed to Hon. Marvin Mandel, the Governor of the State of Maryland, Louis L. Goldstein, Comptroller of Treasury, John Leutkemeyer, Treasurer, Board of Public Works of Maryland, James B. Caine, Inc., Ocean City, Maryland, and Maryland Marine Properties, Inc., Ocean City, Maryland.
- 1970, Feb. 24. Answer of Defendant, Maryland Marine Properties, Inc., to Petition to Intervene and Certificate of Service thereon, filed.

App. 27

- 1970, Feb. 27. Motion Ne Recipiatur as to Petition to Intervene as Plaintiffs and Certificate of Service thereon filed.
- 1970, March 11. Motion Ne Recipiatur, Memorandum of Rules in Authority and Certificate of Service thereon filed. Copy of same delivered to Lee W. Bolte, Esq.
- 1970, March 16. Copy of Motion Ne Recipiatur, Memorandum of Rules in Authority, and Amended Certificate of Service thereon filed.
- 1970, April 8. Letters written to: Hon. F. B. Burch and Jon F. Oster, Esq., L. W. Bolte, Esq., R. A. Shelton and T. P. Perkins, III, Esqs., R. D. Coates, Esq., R. M. Pollitt, Esq., and Leonard J. Kerpelman, Esq., setting case for Argument on all Demurrers, Motions, Petitions &c., filed as of the date of this notice, on Monday, May 11, 1970, at 10:00 A.M., per copies of letters filed.
- 1970, April 13. Receipt of notification of assignment date from Robert A. Shelton and Thomas P. Perkins, III, Esqs., filed.
- 1970, April 13. Receipt of notification of assignment date from Lee W. Bolte, Esq., filed.
- 1970, April 13. Receipt of notification of assignment date from Raymond D. Coates, Esq., filed.
- 1970, April 24. Receipt of notification of assignment date from Leonard J. Kerpelman, Esq., filed.
- 1970, April 24. Letter from Leonard J. Kerpelman, Esq., to Frank W. Hales, Clerk, filed.
- 1970, April 24. Copy of letter from Richard H. Outten, Assignment Clerk to Leonard J. Kerpelman, Esq., filed.
- 1970, May 5. Plaintiff's Memorandum of Law, Table of Contents, and Certificate of Service thereon filed.
- 1970, May 6. Memorandum of Law of Defendant James B. Caine, Inc., and Certificate of Service thereon filed.
- 1970, May 11. Motion for summary judgment upon some Issues, Affidavit and Certificate of Service thereon, filed.

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1970, May 11. Judge Daniel T. Prettyman on the Bench. Dave Dawson reporting.

1970, May 11. Leonard J. Kerpelman, Lee W. Bolte, Jon Oster, Raymond D. Coates, Thoman P. Perkins, III, Esqs. in Court.

1970, May 11. Hearings and Argument had on all preliminary Demurrers, Motions and Petitions filed as of this date. Rulings held sub-curia.

1970, May 11. The Motion for summary judgment upon some issues filed May 11, 1970, at 9:30 A.M., is reserved for future Argument and disposition.

1970, May 15. Answer to Memorandum of Law of Defendant James B. Caine, Inc., and Certificate of Service thereon filed.

1970, June 17. Supplementary Plaintiff's Memorandum of Law, and Certificate of Service filed.

1970, Aug. 31. Ordered that:--

1. The Petition to Intervene as Plaintiffs filed by the "North American Habitat Preservation Society and R. Doyle Grabarek, President and Individually, on January 26, 1970, is DENIED;
2. The Motion Ne Recipiatur filed by Defendant James B. Caine, Inc., to the said Petition to Intervene as Plaintiffs, on February 27, 1970, is DENIED;
3. The Motion Ne Recipiatur filed by Complainant to the said Motion Ne Recipiatur filed by the Defendant, James B. Caine, Inc., on March 11, 1970, is DENIED;
4. The Motion Raising Preliminary Objection filed by the Defendant James B. Caine, Inc., on October 21, 1969, is DENIED;
5. The Motion Ne Recipiatur filed by Complainant to Demurrer of the Defendant Maryland Marine Properties, Inc., on November 7, 1969, is DENIED;

6. The Demurrer of Defendant Maryland Marine Properties, Inc., to the Bill of Complaint, filed on October 20, 1969, is SUSTAINED, without leave to the Complainant to amend;
7. The Demurrer of Defendant Board of Public Works to the Bill of Complaint, filed on October 21, 1969, is SUSTAINED, without leave to the Complainant to amend;
8. The "Motion of Complainant for summary judgment upon same Issues" filed by the Complainant on May 11, 1970, being more in the nature of a Demand for Admission of Facts, (which would have been a more appropriate Pleading) is GRANTED, the facts therein having been conceded in the absence of any response thereto by the Defendants; and
9. The Complainant shall pay the costs of this proceeding, per Opinion and Order for Court filed. Copies of the Opinion and Order of Court mailed to Leonard J. Kerpelman, Esq., Jon F. Oster, Esq., Asst. Attorney General, Richard M. Pollitt, Esq., Lee W. Bolte, Esq., Raymond D. Coates, Esq., and to Thomas P. Perkins, III, Esq.

1970, Sept. 2. Demurrer of Defendant James B. Caine, Inc., and Certificate of service filed.

1970, Sept. 2. Answer to Petition to Intervene and Certificate of Service filed.

1970, Sept. 22. ORDERED that, for the reasons assigned in the Opinion and Order of this Court filed on August 31, 1970, which said Opinion is specifically incorporated herein, by reference thereto, as though fully set forth herein, the "Petition To Intervene as Plaintiffs" filed by the "North American Habitat Preservation Society" and R. Doyle Grabarek, on January 26, 1970, be, and the same is hereby DENIED, and the Demurrer of James B. Caine, Inc., be, and the same is hereby, SUSTAINED, without leave to the Complainant to amend, per Order of Court, filed. Copies of Order of Court mailed to Leonard

J. Kerpelman, Esq., Jon F. Oster, Esq., Asst. Attorney General, Richard M. Pollitt, Esq., Lee W. Bolte, Esq., Raymond D. Coates, Esq., and Thomas P. Perkins, III, Esq.

1970, Sept. 29. Order for Appeal and Certificate of Service filed.

1970, Oct. 1. Photo copy of Amended Statement of costs dated October 1, 1970, mailed to Leonard J. Kerpelman, Esq., Hon. Francis B. Burch, Jon F. Oster, Esq., Richard M. Pollitt, Esq., Lee W. Bolte, Esq., Raymond D. Coates, Esq., Thomas P. Perkins, III, Esq., and Robert A. Shelton, Esq., Copy of Amended Statement of costs filed.

1970, Oct. 5. Letter dated October 1, 1970, from Leonard J. Kerpelman Esq., Baltimore, Maryland, to David Dawson, Court Reporter, filed.

1970, Oct. 7. Letter from Leonard J. Kerpelman, Esq., to Clerk, Worcester County Court, reply of Clerk at bottom of letter, copy of statement of costs dated Sept. 2, 1970, and copy of Amended Statement of costs dated October 1, 1970, filed. Copy of said letter, reply and statements of costs mailed to Leonard J. Kerpelman, Esq.

1970, Oct. 8. Photo copy of Notice advising attorneys of record the case is ready for inspection and transmission to the Court of Appeals, mailed to Leonard J. Kerpelman, Esq.; Hon. Francis B. Burch; Hon. Jon. F. Oster; Richard M. Pollitt, Esq.; Lee W. Bolte, Esq.; Raymond D. Coates, Esq.; Thomas P. Perkins, III, Esq.; and Robert A. Shelton, Esq., per original notice, filed.

1970, Oct. 26. Order to enter an appeal to the Court of Appeals of Maryland from the Judgment of the Court dated Sept. 22, 1970, per Order filed.

ORDER OF COURT [SEPT. 22, 1970]

On September 2, 1970, the Defendant, James B. Caine, Inc., filed its "Answer To Petition To Intervene" and a "Demurrer" to the Bill of Complaint filed herein. The

same having been duly read and considered, it is this 22nd day of September, 1970, by the Circuit Court for Worcester County, Maryland, under the authority contained in Maryland Rule 1210 c, ORDERED that, for the reasons assigned in the Opinion and Order of this Court filed on August 31, 1970, which said Opinion is specifically incorporated herein, by reference thereto, as though fully set forth herein, the "Petition To Intervene As Plaintiffs" filed by the "North American Habitat Preservation Society" and R. Doyle Grabarek, on January 26, 1970, be, and the same is hereby, DENIED, and the Demurrer of James B. Caine, Inc., be, and the same is hereby, SUSTAINED, without leave to the Complainant to amend.

DANIEL T. PRETTYMAN,
Judge

MOTION TO DISMISS APPEAL

James B. Caine, Inc., Appellee, by Sanford and Bolte, its Attorneys, moves this Honorable Court, pursuant to Maryland Rule 835, subsection b (3), that this Appeal be dismissed as to said Appellee. The grounds of the Motion are as follows:

1. No Order for Appeal was filed with the Clerk of the Court below within thirty (30) days from the date of the Order appealed from, as prescribed by Maryland Rule 812, the aforesaid Order in favor of the Defendants, having been entered on September 22, 1970, and the Appeal therefrom having been filed on October 26, 1970. The Appeal should therefore be dismissed under Rule 835, subsection b (3).

Appellee further desires that this Motion be set down for oral argument in advance of the argument on the merits. Said Appellee believes that the grounds of the Motion are such that the disposition of this Motion will make argument on the merits unnecessary as to said Appellee.

SANFORD AND BOLTE

COPY

M. Oster

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

E. ROBERT SEAVER
CLERK OF THE COURT

OCT 12 1971

✓
Leonard J. Kerpelman, Esq.
2403 Rogers Bldg.
Baltimore, Maryland 21209

RE: KERPELMAN v. BOARD OF PUBLIC WORKS OF
MARYLAND, ET AL., No. 71-199.

Dear Sir:

The Court today denied the petition for
a writ of certiorari in the above-entitled case.

Very truly yours,

E. Robert Seaver, Clerk
By

E. T. Seaver
Assistant Clerk

STATE TWM DEPT

OCT 13 1971

RECEIVED

✓
Jon F. Oster, Esq.
Asst. Attorney General of Maryland
1400 One South Olvert Bldg.
Baltimore, Maryland 21202

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1971

No. 71-199

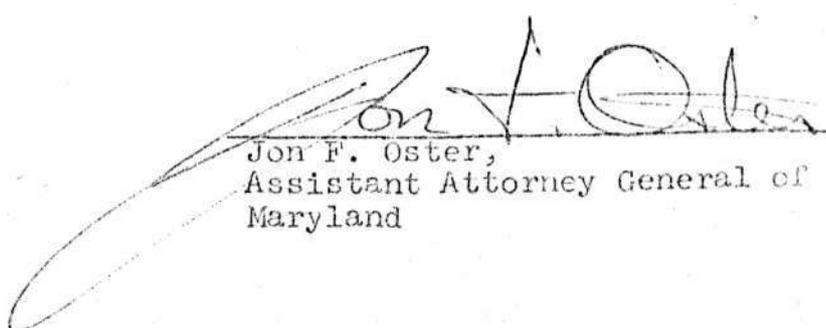
ELINOR H. KERPELMAN,
Petitioner

vs.

BOARD OF PUBLIC WORKS OF MARYLAND, et al
Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 1971, three copies of the Brief for Respondent Board of Public Works of Maryland In Opposition were mailed, postage prepaid, to Leonard J. Kerpleman, Attorney for Petitioner, 500 Equitable Building, Baltimore, Maryland 21202, to Thomas P. Perkins, Esquire, Attorney for Maryland Marine Properties, Inc., Mercantile Bank & Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201, and to Robert Barnhouse, Esquire, Attorney for James B. Caine, Inc., 900 First National Bank Building, Baltimore, Maryland 21202. I further certify that all parties required to be served have been served.


Jon F. Oster,
Assistant Attorney General of
Maryland

M. Ester

IN THE SUPREME COURT OF THE UNITED STATES

ELIJAH H. KERPELMAN	:	
	:	
Petitioner	:	
	:	OCTOBER TERM
vs.	:	1971
	:	
HON. MARVIN MANDEL, Governor, et al	:	
	:	Misc.No.
Respondents	:	
	:	

PROOF OF SERVICE

I, Leonard J. Kerpelman, attorney for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the *7th* day of *Aug*, 1971, I served a copy of the foregoing Petition for Writ of Certiorari to the ~~United States Court of Appeals for the Fourth Circuit~~ *Court of Appeals of Maryland* on:

1. Lee W. Bolte, Esq., Main Street, Berlin, Maryland, attorney for James B. Caine, Inc.
2. Robert A. Shelton, Esq., and Thomas P. Perkins, III, Esq., 1100 Mercantile Trust Building, Baltimore, Maryland 21202, attorneys for Defendant Maryland Marine Properties, Inc.
3. Raymond D. Coates, Esq., 1 Broad Street, Berlin, Maryland 21811, attorney for Maryland Marine Properties, Inc.
4. Francis B. Burch, Esq., Attorney General, and Jon F. Oster, Esq., 1200 One Charles Center, Baltimore, Maryland 21201, attorneys for the Board of Public Works.
5. Richard M. Pollitt, Esq., Pollitt, Hughes & Bahen, 110 North Division Street, Salisbury, Maryland 21801, attorney for the Board of Public Works.

*And of this Proof of Service,
All by first class mail.*

Leonard J. Kerpelman
Attorney for Petitioner

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. _____, OCTOBER TERM, 19 71

Elinor H. Kerpelman Board of Public Works Of Maryland

vs.

(Petitioner or ~~Appellant~~)

(Respondent or ~~Appellee~~)

The Clerk will enter my appearance as Counsel for the Respondent, James B. Caine, Inc.

Signature

Robert B. Barnhouse

Type or Print Name

Robert B. Barnhouse

Address

900 First National Bank Bldg.

City and State

Baltimore, Maryland 21202

NOTE: This appearance must be signed by an individual Member of the Bar of the Supreme Court of the United States.

The Clerk is requested to notify counsel of action of the Court by means of:

Collect Telegram

Airmail Letter

Regular Mail

NOTE: When more than one attorney represents a single party or group of parties, counsel should designate a particular individual to whom notification is to be sent, with the understanding that if other counsel should be informed he will perform that function.

In this case the person to be notified for is:

Petitioner(s)

Respondent(s)

Appellant(s)

Appellee(s)

Amicus

(Name—Type or Print)

(Street Address)

(City, State and Zip Code)

Received 8/19/71
State Law Dept.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

Elino H. Kerpelman
Appellant—Petitioner

vs.

Board of Public Works, et al.
Appellee—Respondent

No. 71-199

To Francis B. Burch Sr & John F. Oster Esq, Counsel for Appellee—Respondent:

YOU ARE HEREBY NOTIFIED that an appeal—a petition for a writ of certiorari—in the above-entitled and numbered case was docketed in the Supreme Court of the United States on the 9th day of Aug., 1971.

received Aug. 15

At the request of the Clerk of the Supreme Court, we are sending attached hereto an appearance form to be filed by you, or other counsel who will represent your party, with the Clerk at or before the time you file your response to our petition or jurisdictional statement.

Elino H. Kerpelman
Counsel for Appellant—Petitioner

2403 Rogers Bldg
Number and Street

Balto.: Md. 21209
City, State and Zip Code

NOTE: Please indicate whether the case is an appeal or a petition for certiorari by crossing out the inapplicable terms. A copy of this notice need not be filed in the Supreme Court.

Amended Statement of Costs
October 1, 1970

In The Circuit Court for Worcester County

Elinor H. Kerpelman

VS.

No. 8934 Chancery

Hon. Marvin Mandel, Governor,
al

Term, 19.....

STATEMENT OF COSTS

PLAINTIFF'S

DEFENDANT'S

ATTORNEY	\$10.00	ATTORNEY	\$10.00
CLERK	\$10.00)Pd. 9/30/69	CLERK	\$
ADD'L CLERK	\$95.00	ADD'L CLERK	\$
SHERIFF Balto. City	\$8.00)Pd. 9/30/69	SHERIFF	\$
ADD'L SHERIFF	\$	ADD'L SHERIFF	\$
EXAMINER	\$	EXAMINER	\$
WITNESSES	\$	WITNESSES	\$
REGISTER OF WILLS	\$	REGISTER OF WILLS	\$
GUARDIAN AD LITEM	\$	_____	\$
RECORD	\$25.00	_____	\$
SHERIFF ADD'L L. (Wor. Co.)	\$4.00)Pd. 9/30/69	_____	\$

Test Frank W. Hales
Clerk of the Circuit Court for Worcester County.

Amended Statement of Costs
October 1, 1970

Elinor H. Kerpelman

In The Circuit Court for Worcester County

VS.

No. 893A Chancery

Hon. Marvin Mandel, Governor,
al

Term, 19.....

STATEMENT OF COSTS

PLAINTIFF'S

DEFENDANT'S

ATTORNEY \$10.00

CLERK \$10.00 Pd. 9/30/69

ADD'L CLERK \$95.00

SHERIFF Balto. City . \$ 8.00 Pd. 9/30/69

ADD'L SHERIFF \$.....

EXAMINER \$.....

WITNESSES \$.....

REGISTER OF WILLS . \$.....

GUARDIAN AD LITEM . \$.....

RECORD \$25.00

SHERIFF ADD'L (Wor. Co.) \$ 4.00 Pd. 9/30/69

ATTORNEY \$ 10.00

CLERK \$.....

ADD'L CLERK \$.....

SHERIFF \$.....

ADD'L SHERIFF \$.....

EXAMINER \$.....

WITNESSES \$.....

REGISTER OF WILLS . \$.....

_____ : \$.....

_____ : \$.....

Test Frank W. Hales
Clerk of the Circuit Court for Worcester County.

ELINOR H. KERPELMAN : IN THE
 Appellant : COURT OF APPEALS
 v. : OF
 BOARD OF PUBLIC WORKS, et al. : MARYLAND
 Appellees : September Term, 1970
 : No. 364
 : : : :

STATEMENT OF PRINTING COSTS

The Board of Public Works, one of the Appellees, by its attorneys, Francis B. Burch, Attorney General, and Jon F. Oster, Assistant Attorney General, pursuant to Maryland Rule 832 of the Maryland Rules of Procedure, hereby certifies that the following accounting represents Appellee's actual cost of printing the Brief in the above captioned case.

The Daily Record Company
 11-15 E. Saratoga Street
 Baltimore, Maryland 21202

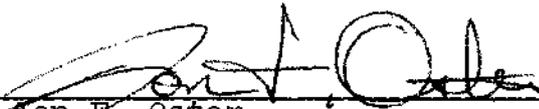
50 Copies Appellee's Brief No. 364

6 Pages at \$6.40	\$38.40
Cover	15.00
4 Lines Corrections at \$.44	1.76
1 Page Index at \$8.00	8.00
Overtime - Composition	16.40
	\$ 79.56
Postage	3.00
TOTAL	\$ 82.56

Respectfully submitted,



 Francis B. Burch
 Attorney General



 Jon F. Oster
 Assistant Attorney General
 14th Floor
 One South Calvert Building
 Baltimore, Maryland 21202
 383-3737

I HEREBY CERTIFY that on this day of July,
1971, a copy of the foregoing Statement of Printing Costs was
mailed, postpaid, to Leonard J. Kerpelman, Esquire, 2403
Rogers Building, Baltimore, Maryland 21209, Attorney for
Appellant.

Jon F. Oster
Assistant Attorney General

ELINOR H. KERPELIMAN : IN THE
 Appellant : COURT OF APPEALS
 v. : OF
 BOARD OF PUBLIC WORKS, et al. : MARYLAND
 Appellees : September Term, 1970
 : No. 364

::: ::: ::: :::

STATEMENT OF PRINTING COSTS

The Board of Public Works, one of the Appellees, by its attorneys, Francis B. Burch, Attorney General, and Jon F. Oster, Assistant Attorney General, pursuant to Maryland Rule 832 of the Maryland Rules of Procedure, hereby certifies that the following accounting represents Appellee's actual cost of printing the Brief in the above captioned case.

The Daily Record Company
 11-15 E. Saratoga Street
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50 Copies Appellee's Brief No. 364

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Cover	15.00
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1 Page Index at \$8.00	8.00
Overtime - Composition	16.40
	<u>\$ 79.56</u>
Postage	3.00
TOTAL	<u>\$ 82.56</u>

Respectfully submitted,

Francis B. Burch
 Attorney General

Jon F. Oster
 Assistant Attorney General
 14th Floor
 One South Calvert Building
 Baltimore, Maryland 21202
 383-3737

I HEREBY CERTIFY that on this 27th day of July, 1971, a copy of the foregoing Statement of Printing Costs was mailed, postpaid, to Leonard J. Kerpelman, Esquire, 2403 Rogers Building, Baltimore, Maryland 21209, Attorney for Appellant.

Jon F. Oster
Assistant Attorney General

October 28, 1971

Mr. Andrew Heubeck, Jr.
Secretary
Board of Public Works
State Office Building
Annapolis, Maryland 21404

Re: Kerpelman v. Board of Public Works, et al.

Dear Mr. Heubeck:

Attached is correspondence relating to the payment of costs of printing the brief of the Board of Public Works in the above captioned case. Also enclosed is the invoice of the Daily Record Company in the amount of \$82.56 dated January 29, 1971. I have delayed asking you to pay this bill, however, I think we have made the Daily Record Company wait long enough for their money and the bill should be paid.

I will ask Mr. Kerpelman to make his check payable to the Board of Public Works to reimburse the Board for this expenditure.

Sincerely yours,

Jon F. Oster
Assistant Attorney General

JFO/bw

encs.

October 28, 1971

John L. Sanford, Jr., Esquire
State's Attorney for Worcester County
Berlin, Maryland 21811

Re: Invoice re Kerpelman v. Board of Public Works, et al.

Dear Mr. Sanford:

May I acknowledge your letter to Attorney General Burch of October 20, 1971 concerning the invoice from the Daily Record Company for the printing costs of the Board of Public Works' brief in the above captioned case. You were quite correct that the charge is one that properly should be paid by the Board of Public Works. However, Mr. Kerpelman was unsuccessful in the Court of Appeals and the Mandate of the Court assessed this cost to Mr. Kerpelman. I have endeavored, unsuccessfully I should add, to obtain these funds from Mr. Kerpelman.

I regret any inconvenience caused you by the misunderstanding of the Daily Record Company.

Very truly yours,

Jon F. Oster
Assistant Attorney General

JFO/bw

cc: Mr. Andrew Heubeck, Jr.

PLEASE DO NOT DETACH
FROM FILE

DEPARTMENT OF LAW
OFFICE ROUTE SLIP

DATE	FROM	TO	MESSAGE
10-27-71	J.F.Oster	H.R.Lord	Sanford is correct, the expense is ours and I have been endeavoring to collect it from Kerpelman since his petition for certiorari was denied by the Supreme Court. See attached copy of letter.
	<i>AM</i>	<i>SFO</i>	<i>OK - respond to Sanford & den Kerpelman.</i>

↑
quit work!
↓
12/26

October 14, 1971

Leonard J. Kerpelman, Esquire
2403 Rogers Building
Baltimore, Maryland 21209

Re: Kerpelman v. Board of Public Works, et al.
In the Court of Appeals of Maryland
September Term, 1970 - No. 364

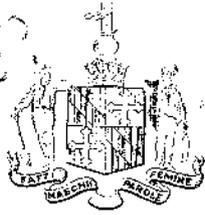
Dear Leonard:

I have received notice that the petition for a writ of certiorari was denied by the Supreme Court of the United States in the above captioned case. Would you please let me have your check for \$82.56 in accordance with the Mandate of the Court of Appeals of Maryland.

Sincerely yours,

Jon F. Oster
Assistant Attorney General

JFO/bw



Order
low!
25 this am
replied on 10/20

JOHN L. SANFORD, JR.

THE STATE'S ATTORNEY FOR WORCESTER COUNTY

BERLIN, MARYLAND

October 20, 1971

Honorable Francis B. Burch
The Attorney General
One South Calvert Street
14th Floor
Baltimore, Maryland 21202

RE: Invoice re Kerpelman v. Board
Of Public Works, et al.

Dear General Burch:

Enclosed herewith you will find the following:

1. Photostatic copy of a letter dated October 14, 1971, which I received from the Daily Record Company together with a photostatic copy of attached invoice thereto;
2. A duplicate copy of my reply to said letter.

I believe the enclosures to be self-explanatory.

Since the matter in question is purely a civil one and involves a State agency, I do not know why the bill in question was ever forwarded to me as it was. In any event, the letter of October 14, 1971, is the first knowledge that I had that the bill in question remained unpaid.

If you disagree with the opinion expressed in my letter to Mr. Hoffman as to the proper liability in this situation, it would be appreciated if you would give me the reasons and the authorities.

Very sincerely yours

John L. Sanford, Jr.
John L. Sanford, Jr.
dlc

JLSJr:drt

cc: R. Curzon Hoffman, III
Honorable Daniel T. Prettyman

THE DAILY RECORD

PUBLISHED DAILY EXCEPT SUNDAY BY

THE DAILY RECORD COMPANY

11-15 EAST SARATOGA STREET

BALTIMORE, MD. 21203

TELEPHONE
PLAZA 2-3849

R. CURZON HOFFMAN III,
PRESIDENT & TREASURER

CHESTER T. WATKINS,
VICE PRESIDENT & SECRETARY

EDWARD J. GOTTSCHALK,
ASSISTANT SECRETARY-TREASURER

JOSEPH M. Mc GOWAN,
EDITOR

October 14, 1971

Hon. John L. Sanford, Jr.
State's Attorney for Worcester County
103 N. Main Street
Berlin, Maryland 21811

Dear Mr. Sanford:

It has come to our attention that the charges shown on the attached statement represent appeals handled by the Office of the Attorney General of Maryland on your behalf.

Payment for these charges has not been received. Since this is the responsibility of the county from whose jurisdiction the appeal was taken, we shall appreciate your assistance in processing these items for payment.

We understand the invoices covering these charges have been forwarded to you by the Attorney General's Office.

If you have any questions about these charges, I shall appreciate hearing from you.

Your assistance in this matter will be greatly appreciated.

Very truly yours,

THE DAILY RECORD COMPANY


R. Curzon Hoffman, III
President

RCH:cg
Enc.

STATEMENT

THE DAILY RECORD COMPANY

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BALTIMORE, MD. 21203

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DEVOTED TO LAW, REAL ESTATE, BUILDING, INSURANCE AND FINANCIAL NEWS.

PHONE, PLAZA 2-3849

ATTORNEY GENERAL'S OFFICE
1300- OneS. Calvert Bldg.
Baltimore, Md. 21202

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PRINTING FOR
THE LAWYER, BANKER,
REAL ESTATE AND
BUSINESS MAN.

TERMS: NET 30 DAYS

WORCESTER COUNTY

DATE	REFERENCE	CHARGES	CREDITS	BALANCE
1/29/71-	50 Copies Appellee's (Board of Public Works of Maryland)- Brief No. 364- Kerpelman v. Board of Public Works, et al.	\$82.56	BALANCE FWD. 127	
				PAY LAST AMOUNT IN THIS COLUMN 127

CODE:

AD- ADVERTISING
PR- PRINTING
SB- SUBSCRIPTION
CS- CASH
CM- CREDIT MEMO

JE- JOURNAL ENTRY
RF- REFUND



JOHN L. SANFORD, JR.

THE STATE'S ATTORNEY FOR WORCESTER COUNTY

BERLIN, MARYLAND

October 20, 1971

C
The Daily Record Company
11-15 East Saratoga Street
Baltimore, Maryland 21203

Attention: R. Curzon Hoffman, III
President

RE: Kerpelman v. Board of Public
Works, et al

O
Dear Mr. Hoffman:

Your letter of October 14, 1971, together with the enclosure has duly been received.

P
I regret the fact that payment for the bill in this matter has not been received.

Y
However, at no time prior hereto have I ever received the invoice referred to therein. If the Attorney General's Office states that said invoice was forwarded to me, the same has never been received.

Furthermore, this case was not a criminal matter but was a civil suit instituted by Mrs. Kerpelman against the Board of Public Works, et al and is entirely a civil matter. Under these circumstances my office is not involved and I know of no reason why the Attorney General would forward me the invoice when the Board of Public Works is involved.

I have discussed this matter with Judge Prettyman and he concurs in my belief that this is a bill to be paid by the Board of Public Works or by the State of Maryland since it is a civil matter.

I am forwarding a duplicate copy of this letter and also of the said bill to the Attorney General of Maryland, together with a copy of your letter and I am requesting that he advise further in the premises.



JOHN L. SANFORD, JR.

THE STATE'S ATTORNEY FOR WORCESTER COUNTY

BERLIN, MARYLAND

The Daily Record Company
October 20, 1971
Page 2

Very sincerely yours

John L. Sanford, Jr.

JLSJr:drt

cc: Honorable Francis B. Burch
Honorable Daniel T. Prettyman

C

O

P

Y

January 22, 1973

Mr. Andrew Heubeck, Jr.
Secretary
Board of Public Works
State Treasury Building
Annapolis, Maryland 21404

Re: Kerpelman v. Board of Public Works
Court of Appeals of Maryland, Sept. Term, 1970 - No. 364

Dear Mr. Heubeck:

This is to advise you that we have finally been successful in collecting the amount of \$82.56 representing the printing costs of the Board of Public Works in accordance with the Mandate of the Court of Appeals of Maryland in the above captioned case.

Because of the peculiar manner in which the check was made out by Mr. Kerpelman, and because it included costs incurred by the State Law Department in filing a statement of claim in the District Court of Maryland, Mr. Kerpelman's check was deposited by the Law Department to the credit of the Treasurer of the State of Maryland to General Fund Revenue.

Since the Board of Public Works paid for printing the brief during the prior fiscal year there is no need to have the Treasurer's Office transfer the funds from the Law Department records to the Board of Public Works.

Please use this information for the Board of Public Works' agenda to note the close of the case.

Very truly yours,

Jon F. Oster
Assistant Attorney General

JFO/bw

State of Maryland



Board of Public Works

Annapolis, Maryland

May 11, 1972

Marvin Mandel
Governor
Louis F. Goldstein
Comptroller
John A. Knethmeyer
Treasurer
Andrew Heubeck, Jr.
Secretary

Mr. Jon F. Oster
Assistant Attorney General
One South Calvert Street
14th Floor
Baltimore, Maryland 21202

Dear Mr. Oster:

Reference is made to your letter of March 28, 1972 wherein you recommend the Board write-off the \$82.56 owed by Mr. Kerpelman to the State. The Board agreed that no matter what it cost, you are to take the necessary steps to collect this debt.

They will appreciate it if you will proceed with the necessary legal action.

Yours very truly,

A handwritten signature in cursive script, appearing to read "Andrew Heubeck, Jr.", written in dark ink.

Andrew Heubeck, Jr.
Secretary

AH:ps

May 18, 1972

Leonard J. Kerpelman, Esquire
2403 Rogers Building
Baltimore, Maryland 21209

Re: Elinor H. Kerpelman v. Board of Public Works
Court of Appeals of Maryland, No. 364,
September Term, 1970

Dear Mr. Kerpelman:

As I advised you by telephone on Tuesday, May 16, the Board of Public Works has instructed me to take any steps which may be necessary to collect the printing costs for the brief of the Board of Public Works in the above captioned case which amounts to \$82.56. This letter will serve to advise you that in the event the receipt of said amount by Monday, May 29, 1972 is not obtained suit will be filed against Elinor H. Kerpelman in the District Court of Maryland.

Very truly yours,

Jon F. Oster
Assistant Attorney General

JFO/bw

March 28, 1972

Mr. Andrew Heubeck, Jr.
Secretary
Board of Public Works
State Office Building
Annapolis, Maryland 21404

Re: Kerpelman v. Board of Public Works

Dear Andy:

As you can see from the enclosed letter from Mr. Kerpelman, he has no intention of paying the printing costs in the above captioned case which amount to \$82.56. I could file suit against Mrs. Kerpelman who is the principal plaintiff in this case, however, my experience with Mr. Kerpelman is such that I know that he would not pay until I actually got the sheriff to levy on his property and I had done a minimum of \$500.00 worth of work. Considerations of time and economy, therefore, impel me to suggest that this bill be written off as uncollectible.

Sincerely yours,

Jon F. Oster
Assistant Attorney General

JFO/bw

enc.

LEONARD J. KERPELMAN

ATTORNEY AT LAW
2403 ROGERS BUILDING
BALTIMORE, MD. 21209

TELEPHONE SA 7-8700
RESIDENCE: 367-8855
CABLE: BOLTLEX

CONSULTATIVE CHAMBERS AT
ROOM 210 HORIZON HOUSE
1101 N. CALVERT AT CHASE

January 6, 1972

Jon F. Oster, Esq.
Assistant Attorney General
One South Calvert Street
Baltimore, Maryland 21202

Re: Kerpelman vs. Board of Public Works

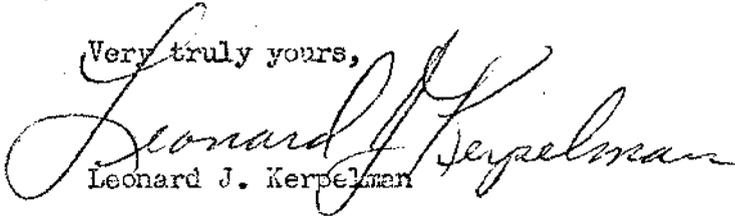
Dear Jon:

I am sorry to have been somewhat dilatory in answering your repeated requests concerning payment of costs in the above case.

This case was sponsored entirely by two environmental groups who are absolutely insolvent, and probably have a combined total of \$11 in the bank.

They have, for this reason, declined to pay the costs in the case, being unable to do so.

Very truly yours,


Leonard J. Kerpelman

LJK:mca

December 28, 1971

Leonard J. Kerpelman, Esquire
2403 Rogers Building
Baltimore, Maryland 21209

Re: Kerpelman v. Board of Public Works, et al.

Dear Leonard:

I am returning the Credit Voucher No. A 244066 of the State of Maryland Department of Motor Vehicles. Certainly you must know that I cannot accept the same and that to attempt to apply it against the outstanding bill for printing costs in the above captioned case, assuming it were possible, would be incredibly cumbersome and expensive from an accounting point of view.

If you cannot or will not pay this charge please advise me so that I can notify the Board of Public Works and ask that the Secretary bring this matter before the Board and request that the Board authorize the State to pay this charge which is legally yours.

I might add that no matter how laudable and well-meaning your objectives might have been in pursuing this action against the Board of Public Works, the Court of Appeals has determined that legally you had no standing to bring the action and that you should pay the expenses of the State for its printing costs in your appeal. I will not even go into the matter of how much it cost the State in terms of attorneys' time.

Sincerely yours,

Jon F. Oster
Assistant Attorney General

JFO/bw

enc.



This Credit Voucher
must be redeemed within 60 days of issue.

No. A 244066

Date 12-10-72

* There is on deposit with this Department a sum of

One

100 ^{KX} dollars \$ 1.00

credited to the account of

Leonard J. Karpelman

Baltimore, Md.

STATE OF MARYLAND
DEPARTMENT OF MOTOR VEHICLES

6601 RITCHIE HIGHWAY, N. E.
GLEN BURNIE, MARYLAND 21061

Cashier Karen Friedrich

(Non-Negotiable - Read other side)

"IMPORTANT - READ CAREFULLY"

1. This credit voucher is valid for 60 days from the date of issue.
2. During these 60 days it may be used as payment, or part-payment, for the purchase of vehicle title, vehicle license plates, driver license, certified record, etc., from this Department.
3. It will not be accepted as part of any departmental transaction after 60 days.
4. After 60 days, it must be returned to the Accounting Section of the Department of Motor Vehicles, with a written request for a refund of the full amount shown. Allow 30 days for delivery of refund.
5. Person presenting this voucher for redemption must endorse.
6. This voucher is negotiable only at the Department of Motor Vehicles, under the conditions outlined above.

SIGNATURE

FOR VALUE RECEIVED

LEONARD J. KERPELMAN

ATTORNEY AT LAW
2403 ROGERS BUILDING
BALTIMORE, MD. 21209

TELEPHONE SA 7-8700
RESIDENCE: 367-8855
CABLE: BOLTLEX

CONSULTATIVE CHAMBERS AT
ROOM 210 HORIZON HOUSE
1101 N. CALVERT AT CHASE

December 17, 1971

Jon F. Oster, Esq.
Assistant Attorney General
One South Calvert Street
Baltimore, Maryland 21202

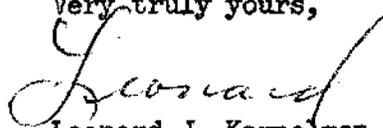
Re: Kerpelman vs. Board of Public Works

Dear Jon:

I have called to the attention of the group which instigated the above case, the outstanding bill of \$82.56, and have been assured that at the next meeting of the Directors, an attempt will be made to dispose of the matter.

In the meantime, I am enclosing a valuable credit voucher, which, please apply to this debit.

Very truly yours,


Leonard J. Kerpelman

Enclosure

LJK:mca

December 10, 1971

Leonard J. Kerpelman, Esquire
2403 Rogers Building
Baltimore, Maryland 21209

Re: Kerpelman v. Board of Public Works, et al.

Dear Leonard:

Once again the bookkeeper has requested that I contact you in reference to the outstanding costs in the amount of \$82.56 due by you in the above captioned case. I would appreciate your taking care of this bill as soon as possible so that we may complete our records and close the file in this matter.

Sincerely yours,

Jon F. Oster
Assistant Attorney General

JFO/bw

November 15, 1971

Leonard J. Kerpelman, Esquire
2403 Rogers Building
Baltimore, Maryland 21209

Re: Kerpelman v. Board of Public Works, et al.

Dear Leonard:

I enclose a copy of the invoice from The Daily Record Company in the amount of \$82.56 for costs of printing Appellee's Brief in the above captioned case. The Board of Public Works has made this expenditure and I am again requesting your check in the amount of \$82.56, made payable to the Board of Public Works, for its reimbursement.

Sincerely yours,

Jon F. Oster
Assistant Attorney General

JFO/bw

enc.

THE DAILY RECORD COMPANY

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ESTATE AND BUSINESS MAN.

pd.

* Attorney General
1200 One Commerce Center
Baltimore, Maryland 21201

DATE Jan. 23, 1971

50	Copies Appellants' (Board of Public Works of Maryland) Brief No. 364— Karpalman v. Board of Public Works, et al.		
6	Pages @ \$6.40	\$ 38.40	
	Cover	15.00	
4	Lines Corrections @ 44¢	1.76	
1	Page Index @ \$2.00	2.00	
	Overtime - Composition	<u>16.40</u>	
		\$ 73.56	
	Tax Receipt Postage	<u>3.00</u>	82.56

October 14, 1971

Leonard J. Kerpelman, Esquire
2403 Rogers Building
Baltimore, Maryland 21209

Re: Kerpelman v. Board of Public Works, et al.
In the Court of Appeals of Maryland
September Term, 1970 - No. 364

Dear Leonard:

I have received notice that the petition for a writ of certiorari was denied by the Supreme Court of the United States in the above captioned case. Would you please let me have your check for \$82.56 in accordance with the Mandate of the Court of Appeals of Maryland.

Sincerely yours,

Jon F. Oster
Assistant Attorney General

JFO/bw

bcc: Warren Rich, Esquire

October 13, 1971

Mr. Andrew Heubeck, Jr.
Secretary
Board of Public Works
State Office Building
Annapolis, Maryland 21404

Re: Kerpelman v. Board of Public Works of Maryland
In the Supreme Court of the United States
No. 71-199

Dear Mr. Heubeck:

Enclosed is a notice from the Supreme Court of the United States advising us that on October 12, 1971 the Court denied the petition for a writ of certiorari in the above entitled case.

Sincerely yours,

Jon F. Oster
Assistant Attorney General

JFO/bw

enc.

September 15, 1971

Mr. Andrew Heubeck, Jr.
Secretary
Board of Public Works
State Office Building
Annapolis, Maryland 21404

Re: Kerpelman v. Board of Public Works, et al.
In the U. S. Supreme Court No. 71-199

Dear Mr. Heubeck:

There are enclosed an original and two copies of the invoice from The Daily Record Company in the amount of \$58.50 for printing costs in the above captioned case. Will you please see that these costs are paid.

Sincerely yours,

Jon F. Oster
Assistant Attorney General

JFO/bw

encs.

THE DAILY RECORD COMPANY

52019

11-15 EAST SARATOGA STREET BALTIMORE, MD. 21203

PHONE: PLAZA 2-3849

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GENERAL INTELLIGENCE.

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ESTATE AND BUSINESS MAN.

*Attorney General
Attn: Mr. Jon F. Oster
1300 One South Calvert Bldg.
Baltimore, Maryland 21202

September 13, 1971

DATE

<p>50 Copies U. S. Supreme Court Brief In Opposition No. 71-199 Kerpelman v. Board of Public Works of Maryland, et al</p> <p>4 Pages @ \$6.40 Cover Overtime Operations</p> <p>ORIGINAL INVOICE CERTIFIED JUST AND CORRECT PAYMENT NOT RECEIVED THE DAILY RECORD CO.</p> <p><i>[Signature]</i></p>	<p>\$25.60 15.00 <u>17.90</u></p> <p>Tax Exempt</p>	<p>\$58.50</p>	
--	---	----------------	--

September 8, 1971

Mr. Andrew Heubeck
Secretary
Board of Public Works
State Office Building
Annapolis, Maryland 21404

Re: Elinor H. Kerpelman v. Board of Public
Works of Maryland, et al

Dear Mr. Heubeck:

I am enclosing a copy of the brief in opposition for the Board of Public Works of Maryland which I have filed in the Supreme Court of the United States in the above captioned case. I am also enclosing copy of the brief which we filed in the Court of Appeals of Maryland, in case I have not previously done so in order that you can complete your file.

Sincerely,

Jon F. Oster,
Assistant Attorney General

JFO:k
enclosures

J. CROSSAN COOPER, JR.
JOHN HENRY LEWIN
H. VERNON ENEY
NORWOOD B. ORRICK
RICHARD W. EMORY
EDMUND P. DANDRIDGE, JR.
ARTHUR W. MACHEN, JR.
ROBERT M. THOMAS
FRANCIS D. MURNAGHAN, JR.
A. SAMUEL COOK
K. RAYMOND CLUSTER
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CHARLES B. REEVES, JR.
WILLIAM J. MCCARTHY
RUSSELL R. RENO, JR.
FREDERICK STEINMANN
THEODORE W. HIRSH
WILLIAM O. EVANS
THOMAS P. PERKINS, III
JOSEPH H. H. KARLAN
BENJAMIN R. CIVILETTI
GERALD M. KATZ
LUKE MARBURY
STUART H. ROME
C. VAN LEUVEN STEWART
LAWRENCE S. WESCOTT

VENABLE, BAETJER AND HOWARD

ATTORNEYS AT LAW
1800 MERCANTILE BANK & TRUST BUILDING
2 HOPKINS PLAZA
BALTIMORE, MARYLAND 21201
TELEPHONE 752-6780
AREA CODE 301

September 1, 1971

ALAN M. WILNER
ANTHONY M. CAREY
WILBUR E. SIMMONS, JR.
JAMES L. LEWIN
HARRY D. SHAPIRO
GEORGE C. DOUB, JR.
JOHN HENRY LEWIN, JR.
ARNOLD P. SCHUSTER
LEE M. MILLER
STANLEY MAZAROFF
ALAN D. YARBRO
NEAL D. BORDEN
ROBERT A. SHELTON
JACOB L. FRIEDEL
RICHARD W. EMORY, JR.
HARVEY R. CLAPP, III
H. PETER LARCAU
WILLIAM J. GIACORCI
BENJAMIN ROSENBERG
DOUGLAS D. CONNAH, JR.
ROBERT G. SMITH
JAMES D. WRIGHT

OF COUNSEL
JOSEPH FRANCE

Jon F. Oster, Esq.
Office of the Attorney General
1200 One Charles Center
Baltimore, Maryland 21201

Dear Jon:

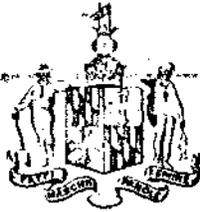
Enclosed is a copy of our brief in the
Kerpelman case, which we are sending over to the
Daily Record.

Sincerely,

Thomas P. Perkins, III

TPP:ah
Enclosure
42125

P.S. Where is a good place to rent a cutaway for the
oral argument?



Circuit Court for Worcester County

FRANK W. HALES, CLERK

SNOW HILL, MD.

August 9, 1971

OSTER

Leonard J. Kerpelman, Esquire
Attorney at Law
2403 Rogers Building
Baltimore, Maryland 21209

Re: No. 8934 Chancery
Elinor H. Kerpelman
Vs
Board of Public Works, et al

Dear Mr. Kerpelman:

Please be advised the above named case is being forwarded this date to the Clerk of the Supreme Court of the United States, Supreme Court Building, Washington, D.C.

Very truly yours,

Frank W. Hales, Clerk
Frank W. Hales, Clerk

Photo copy to:

Honorable Francis B. Burch
Attorney General
1200 One Charles Center
Baltimore, Maryland 21201

Honorable Jon F. Oster
Assistant Attorney General
1200 One Charles Center
Baltimore, Maryland 21201

Richard M. Pollitt, Esquire
Attorney at Law
Salisbury, Maryland 21801

Lee W. Bolte, Esquire
Attorney at Law
Berlin, Maryland 21811

Raymond D. Coates, Esquire
Attorney at Law
Berlin, Maryland 21811

(Continued)

Thomas P. Perkins, III, Esquire
1400 Mercantile Trust Building
Baltimore, Maryland 21202

Robert A. Shelton, Esquire
1400 Mercantile Trust Building
Baltimore, Maryland 21202

July 27, 1971

Leonard J. Kerpelman, Esquire
2403 Rogers Building
Baltimore, Maryland 21209

Re: Kerpelman v. Board of Public Works, et al.
In the Court of Appeals of Maryland
September Term, 1970 - No. 364

Dear Leonard:

While you have your wallet out for Tom Perkins, I also need \$82.56 as certified by the Court of Appeals of Maryland in its Mandate in the above captioned case for the cost of printing the Brief for Appellee, Board of Public Works.

Sincerely yours,

Jon F. Oster
Assistant Attorney General

JFO/bw

enc.

COPY

VENABLE, BAETJER AND HOWARD
ATTORNEYS-AT-LAW
1800 MERCANTILE BANK & TRUST BUILDING
2 HOPKINS PLAZA
BALTIMORE, MARYLAND 21201

July 23, 1971

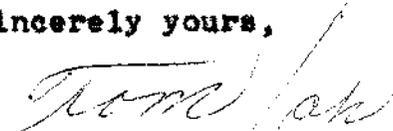
Leonard J. Kerpelman, Esq.
2403 W. Rogers Boulevard
Baltimore, Maryland 21209

Dear Leonard:

I am in receipt of a blind copy of your letter of July 19, 1971 addressed to the Clerk of the Circuit Court for Worcester County, indicating your purported petition for writ of certiorari. I find hard to understand this latest effort at futility inasmuch as you well know the period for filing a writ for certiorari from the Order of the Court of Appeals of Maryland, dated April 12, 1971, has expired.

I would also call your attention to the fact that you owe costs under the Order of the Court of Appeals both to my client and to the Board of Public Works. I would expect to receive from you promptly my costs in the amount of \$212.19 as certified by the Court of Appeals of Maryland.

Sincerely yours,


Thomas P. Perkins, III

TPP:ah

cc: Jon F. Oster, Esq., Assistant Attorney General

RECEIVED

1971
JUL 23 1971



Circuit Court for Worcester County

FRANK W. HALES, CLERK

SNOW HILL, MD.

July 23, 1971

Leonard J. Kerpelman, Esq.
Attorney at Law
2403 Rogers Building
Baltimore, Md. 21209

Re: Elinor H. Kerpelman
Vs: Marvin Mandel, et al
No. 8934 Chancery Docket

Dear Mr. Kerpelman:

I am in receipt of your letter dated July 19, 1971. The record in the above entitled case is now being prepared by this office for transmission to the Supreme Court of the United States. Immediately upon receipt of the sum of \$25.00 as cost for the preparation of record, I will forward this case to the Supreme Court.

I am enclosing a Statement of Costs with this letter. The record will not be forwarded until the aforesaid sum has been paid.

Very truly yours,

Frank W. Hales, Clerk

cmk

Enclosure

cc Clerk of the Supreme Court of the United States
The Honorable Francis B. Burch
The Honorable Jon F. Oster
Richard M. Pollitt, Esquire
Lee W. Bolte, Esquire
Raymond D. Coates, Esquire
Thomas P. Perkins, III, Esquire
Robert A. Shelton, Esquire

M. Oster

July 19, 1971

Clerk
Circuit Court for Worcester County
Snow Hill, Maryland

Re: Elinor H. Kerpelman vs. Marvin Mandel, et al
No. 8934

Gentlemen:

In accordance with Rule 21(1), the Plaintiff is intending to file a Petition for Certiorari with the Supreme Court of the United States in the above-entitled case, and hereby requests you to certify the record in the case, and to provide for its transmission to the Supreme Court of the United States.

Very truly yours,

Leonard J. Kerpelman

LJK:mea

cc: Francis B. Burch, Esq.
Jon F. Oster, Esq.

cc: Clerk
Supreme Court

STATE CIV DEPT

RECORDED

March 9, 1971

Raymond S. Smethurst, Jr., Esquire
Adkins, Potts & Smethurst
111 High Street
Salisbury, Maryland 21801

Re: Elinor H. Kerpelman v. Governor of Maryland, et al.
In the Court of Appeals of Maryland
September Term, 1970 - No. 364

Dear Mr. Smethurst:

I enclose copies of my Brief and the Appellant's Brief and Appendix in the above captioned case. I do not have an extra copy of Tom Perkins' Brief on behalf of the other Appellees. Perhaps you can get a copy from him.

Sincerely yours,

Jon F. Oster
Assistant Attorney General

JFO/bs

encs.

January 27, 1971

Thomas P. Perkins, Esquire
Venable, Baetjer & Howard
1800 Mercantile Bank & Trust Bldg.
Baltimore, Maryland 21201

Re: Kerpelman v. Board of Public Works of Maryland, et al.
In the Court of Appeals of Maryland
September Term, 1970 - No. 364

Dear Tom:

I enclose a copy of the Brief of the
Appellee, Board of Public Works of Maryland, in the
above captioned case.

Sincerely yours,

Jon F. Oster
Assistant Attorney General

JFO/bs

enc.

January 27, 1971

Leonard J. Kerpelman, Esquire
2403 Rogers Building
Baltimore, Maryland 21209

Re: Kerpelman v. Board of Public Works of
Maryland, et al.
In the Court of Appeals of Maryland
September Term, 1970 - No. 364

Dear Mr. Kerpelman:

Enclosed please find a copy of the Brief
of the Appellee, Board of Public Works of Maryland,
in the above captioned case.

Very truly yours,

Jon F. Oster
Assistant Attorney General

JFO/bs

enc.

COPY

VENABLE, BAETJER AND HOWARD
ATTORNEYS-AT-LAW
1800 MERCANTILE BANK & TRUST BUILDING
2 HOPKINS PLAZA
BALTIMORE, MARYLAND 21201

December 17, 1970

Mr. J. Lloyd Young, Clerk
Court of Appeals of Maryland
Court of Appeals Building
Annapolis, Maryland 21404

Re: Kerpelman v. Board of Public Works of Maryland
et al - No. 364

Dear Mr. Young:

In accordance with my discussion yesterday with Mr. Norris, I enclose herewith a Stipulation extending time for filing briefs in the above-referenced case.

Very truly yours,

Thomas P. Perkins, III

TPP:ah
Enclosure
39839

cc: Leonard J. Kerpelman, Esquire
Jon F. Oster, Assistant Attorney General

December 14, 1970

Thomas P. Perkins, Esquire
Venable, Baetjer & Howard
1800 Mercantile Bank & Trust Building
Baltimore, Maryland 21201

Re: Kerpelman v. Board of Public Works of Maryland, et al.
In the Court of Appeals of Maryland
September Term, 1970 - No. 364

Dear Tom:

I enclose an original and two copies of a Stipulation for extension of time for filing briefs in the above captioned case. I will appreciate your obtaining Leonard Kerpelman's signature on the Stipulation prior to your signing and filing it in the Court of Appeals.

Sincerely yours,

Jon F. Oster
Assistant Attorney General

JFO/bs

encs.

THE COURT OF APPEALS—ANNAPOLIS, MARYLAND 21404

Mr. Bolte

November 18, 1970

Lee W. Bolte, Esq.
Attorney at Law
P. O. Box 127
Berlin, Maryland 21811

Dear Mr. Bolte:

We are enclosing herewith copy of a motion and Order of this Court signed on November 16, 1970, in the case of Elinor H. Kerpelman v. Board of Public Works of Maryland et al., No. 364, September Term, 1970, which is self-explanatory.

Our records have been noted accordingly.

Very truly yours,

[Signature]

Clerk

JHE/ojr
Enclosure

cc: Leonard J. Kerpelman, Esq.
Office of the Attorney General ✓
Richard M. Pollitt, Esq.
Raymond D. Coates, Esq.
Thomas P. Perkins, III, Esq.

J. CROSSAN COOPER, JR.
JOHN HENRY LEWIN
H. VERNON CNEY
NORWOOD B. ORRICK
RICHARD W. EMORY
EDMUND P. DANDRIDGE, JR.
ARTHUR W. MACHEN, JR.
ROBERT M. THOMAS
FRANCIS D. MURNAGHAN, JR.
A. SAMUEL COOK
H. RAYMOND CLUSTER
ROBERT R. BAIR
JACQUES T. SCHLENGER
CHARLES B. REEVES, JR.
WILLIAM J. MCCARTHY
RUSSELL R. RENO, JR.
FREDERICK STEINMANN
THEODORE W. KIRSH
WILLIAM O. EVANS
THOMAS P. PERKINS, III
JOSEPH H. H. KAPLAN
BENJAMIN R. CIVILETTI
GERALD M. KATZ
LUKE MARBURY
STUART H. ROME
C. VAN LEUVEN STEWART
LAWRENCE S. WESCOTT

VENABLE, BAETJER AND HOWARD

ATTORNEYS AT LAW
MERCANTILE TRUST BUILDING
BALTIMORE & CALVERT STS.
BALTIMORE, MARYLAND 21202

TELEPHONE 752-6780
AREA CODE 301

November 10, 1970

PAUL S. SARBANES
ALAN M. WILNER
ANTHONY M. CAREY
WILBUR E. SIMMONS, JR.
JAMES L. LEKIN
HENRY R. LORD
JAMES W. HUNT
FREDERICK P. ROTHMAN
GEORGE C. DOUB, JR.
JOHN HENRY LEWIN, JR.
ALAN D. YARBRO
THOMAS J. KENNEY, JR.
NEAL D. BORDEN
ROBERT A. SHELTON
JACOB L. FRIEDEL
HARRY TETER, JR.
RICHARD W. EMORY, JR.
PHILIP J. BRAY
HARVEY R. CLAPP, III
WILLIAM J. GIACOFCI
BENJAMIN ROSENBERG
DOUGLAS D. CONNAR, JR.

JOSEPH FRANCE
COUNSEL

Leonard J. Kerpelman, Esquire
2403 Rogers Building
Baltimore, Maryland 21209

*ADMITTED IN DISTRICT OF COLUMBIA AND
WEST VIRGINIA — NOT IN MARYLAND

Re: Elinor H. Kerpelman vs. Hon. Marvin Mandel et al
No. 364, September Term
Court of Appeals of Maryland

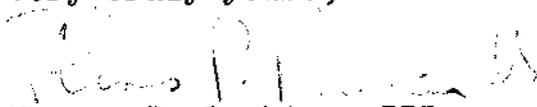
Dear Mr. Kerpelman:

I am in receipt of your statement designating the record extract in the above-captioned case.

I would call your attention to the fact that you have omitted the inclusion of the Order of Court dated September 22, 1970 which must be included as provided in Rule 828b.1(a); otherwise, the record extract as proposed by you is satisfactory to me.

I would caution you to print verbatim all pleadings set forth in your statement as required by Rule 828a.

Very truly yours,


Thomas P. Perkins, III

TPP:ah
39839

cc: Lee W. Bolte, Esquire
Hon. Francis B. Burch
Hon. Jon F. Oster
Richard M. Pollitt, Esquire
Raymond D. Coates, Esquire



Circuit Court for Worcester County

FRANK W. HALES, CLERK

SNOW HILL, MD.

TO: Hon. Francis B. Burch and
Jon F. Oster, Esq.
Suite 1200 - One Charles Center
Baltimore, Md. 21201

DATE: April 8, 1970.

RE: Elinor H. Kerpelman
VS: Board of Public Works of Md., Al
No. 8934 Chancery Docket.

Gentlemen:

The above case has been scheduled as follows:

Argument on all Demurrers, Motions,
Petitions &c., filed as of the
date of this notice, on Monday, May 11, 1970, at 10:00 A.M.
The Court has directed me to inform you that unless application for postponement of the Trial
or Hearing is made within five (5) days after receipt of this notice, or an emergency has
occurred thereafter, the aforementioned trial or hearing will be held as scheduled.

Requests for a postponement *must* be in writing with a copy to all attorneys of record.

Please confirm this date by filling in the form below on the carbon copy, and returning it to this
office.

Attention is called to the provisions of First Circuit Rules 401 and 548. No case will be postponed
by reason of failure to complete Discovery after the expiration of six months from the due
date of the first responsive pleading. An assessment of \$250.00 will be made in any case withdrawn
from the trial assignment within 72 hours prior to 10:00 o'clock A.M. of the assigned date,
Saturday, Sunday and an intervening legal holiday excluded.

Very truly yours,

RICHARD H. OUTTEN

Assignment Clerk

632-1221 — Ext. 5

Receipt of notification of assignment date in the above captioned matter is hereby acknowledged.

DATE: _____ ATTORNEY: _____



LOUIS L. GOLDSTEIN
COMPTROLLER OF THE TREASURY
STATE TREASURY BUILDING
P. O. BOX 466
ANNAPOLIS, MARYLAND 21404
268-3371

Baltimore Office

January 30, 1970

Elinor H. Kerpelman,
Complainant

v.

Marvin Mandel, et al.,
defendants

Mr. Jon Oster
Assistant Attorney General
State Law Department
1200 One Charles Center
Baltimore, Maryland

Dear Mr. Oster:

Enclosed is copy of Petition in the above mentioned
case as per our telephone conversation. Please direct
it to the proper desk.

Thank you!

Very truly yours,

E. M. Cadogan

October 20, 1969

Mr. Frank W. Hales, Clerk
Circuit Court for Worcester County
Court House
Snow Hill, Maryland 21863

Re: Elinor H. Kerpelman v. Honorable Marvin
Mandel, et al.
No. 8934 Chancery

Dear Mr. Hales:

Please file the enclosed Demurrer of Defendant
Board of Public Works in the above captioned case.

Very truly yours,

Jon F. Oster
Assistant Attorney General

JFO/bs

Oster

VENABLE, BAETJER AND HOWARD

ATTORNEYS AT LAW
MERCANTILE TRUST BUILDING
BALTIMORE & CALVERT STS.
BALTIMORE, MARYLAND 21202

TELEPHONE 752-6780
AREA CODE 301

October 20, 1969

HARRY N. BAETJER
J. CROSSAN COOPER, JR.
JOHN HENRY LEWIN
H. VERNON ENEY
NORWOOD B. ORRICK
RICHARD W. EMORY
EDMUND P. DANDRIDGE, JR.
ARTHUR W. MACHEN, JR.
ROBERT M. THOMAS
FRANCIS D. MURNAGHAN, JR.
ROBERT R. BAIR
JACQUES T. SCHLENGER
CHARLES B. REEVES, JR.
WILLIAM J. MCCARTHY
RUSSELL R. RENO, JR.
FREDERICK STEINMANN
THEODORE W. HIRSH
THOMAS P. PERKINS, III
JOSEPH H. H. KAPLAN
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GERALD M. KATZ

PAUL S. SARGANES
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ALAN D. YARBRO
THOMAS J. KENNEY, JR.
NEAL D. BORDEN
ROBERT A. SHELTON
JACOB L. FRIEDEL
J. FREDERICK MOTZ
RICHARD W. EMORY, JR.
PHILIP J. BRAY

JOSEPH FRANCE
COUNSEL

Fred Oken, Esquire
Office of Attorney General
1200 One Charles Center
Baltimore, Maryland 21201

Re: Kerpelman vs. Mandel, et al
Chancery No. 8934

Dear Fred:

I enclose herewith a copy of the Demurrer and Memorandum of Law which we are filing in the Circuit Court for Worcester County in the above captioned case on behalf of Maryland Marine Properties, Inc.

Sincerely,

Thomas P. Perkins III

TPPIII:agh
enclosure

M. J. ...
...

IN THE COURT OF APPEALS OF MARYLAND

No. 364

September Term, 1970

ELINOR H. KERPELMAN

v.

BOARD OF PUBLIC WORKS OF MARYLAND
et al.

Barnes,
McWilliams
Finan
Singley
Smith,

JJ.

Opinion by Barnes, J.

Filed: April 12, 1971

In this appeal from the Order of the Circuit Court for Worcester County (Prettyman, J.), dated August 31, 1970, sustaining the demurrers of two of the appellees, Maryland Marine Properties, Inc. (Maryland Marine) and the Board of Public Works of Maryland (Board), without leave to amend, to the bill of complaint filed by the appellant, Mrs. Elinor H. Kerpelman, the decisive question is whether or not Mrs. Kerpelman had standing to sue. Having concluded that she does not have such standing, we do not reach the other interesting questions of the constitutionality of Code (1965 Repl. Vol.), Art. 78A, § 15 (the Statute), ^{and of} the propriety of the actions of the Board under that statutory provision and laches.

Mrs. Kerpelman's bill of complaint, filed on September 30, 1969, alleged in paragraph 1 that she "is a taxpayer of the State of Maryland, and a resident thereof, in Baltimore City; this suit is brought on her own behalf, and on behalf of all others similarly situated." She then alleges in paragraph 2 that the Board is given authority by the Statute to dispose of lands of the State of Maryland by sale or otherwise, provided that this is done for "a consideration adequate in the opinion of the Board...." Also, by Art. 6 of the Declaration of Rights of the Maryland Constitution, the members of the Board, individually are "'Trustees of the Public'" in all that they do and must reasonably exercise this fiduciary duty, particularly in regard to their stewardship of property.

It is then alleged in paragraph 3 that in 1968 contrary to the Art. 6 Trusteeship, and without the necessary opinion as to adequacy, the Board - then composed in part of different membership - but being the same constitutional and statutory Board as the present Board, conveyed 190 acres of land then the property of the people of Maryland to the defendant, James B. Caine, Inc.¹ The Board also conveyed to the defendant and appellee, Maryland Marine Properties, Inc., 197 acres of Maryland lands, or did so by mesne conveyances "both for a totally inadequate and insufficient consideration, compared with the then fair market value or intrinsic value of the said lands, and the said Board then had no opinion upon the monetary adequacy of the consideration proffered, or had a mistaken, unreasonable, or totally false opinion of such adequacy," so that the conveyances were illegal and void for failure to comply with the precondition set forth as to adequacy in the Statute and as a violation of the Art. 6 Trusteeship. It is also alleged in paragraph 3 that the consideration for the conveyances was also totally inadequate and insufficient considering "the ecological consequences of the sale, and the direct consequent effect upon the natural resources of the State of Maryland, which are owned" by Mrs. Kerpelman and all others similarly situated and

1. The Chancellor passed an order on September 22, 1970, sustaining the demurrer of James B. Caine, Inc., without leave to amend, for the same reasons assigned in its opinion and order of August 31, 1970; but the order for appeal was not filed until October 26, 1970, or more than the 30-day period provided for appeal under Maryland Rule 812. The defendant and appellee, James B. Caine, Inc., moved to dismiss this appeal pursuant to Rule 835 b (3); and this Court dismissed this appeal on November 16, 1970.

which are held in trust for her and the class she represents in the suit, by the State of Maryland and its public officials including the Board.

The lands mentioned in paragraph 3 are described in paragraph 4 as situate in Worcester County and are marshlands and wetlands, i.e., submerged and partially submerged lands, marshes, and shallows, peculiarly adapted to the production of certain important forms of marine life and constituting an important link in the food chain of many economically valuable wild species of fish, animal and bird life, which abound in Maryland and upon the waters of the State, "which are owned in common, and used by all of the members of the class on whose behalf this suit is brought." These marshlands and wetlands are being filled in and built up by those to whom they were conveyed, it is alleged in paragraph 5, so that their character as such lands is being completely obliterated with the consequent destruction of the fish and animal species already mentioned.

In paragraph 6, it is alleged that the lands conveyed to Maryland Marine were sold by an exchange for other marshlands and wetlands which are "cumulatively only one-half as productive of the important species of marine life and products as those which were conveyed" to Maryland Marine. The land thus exchanged was worth only \$41,000.00 while the lands conveyed ^{to} Maryland Marine "were worth two hundred times as much in fair market monetary value." The lands sold to James B. Caine, Inc. were alleged to have been sold to it for the "completely and totally inadequate money consideration" of \$100.00

an acre and such lands were worth approximately 500 times as much in fair market value as the monetary consideration received by the Board. The monetary consideration, it was alleged in paragraph 7, was, in each case, "so completely and totally inadequate as was known to all parties at that time as to amount to a conveyance of the land by the Defendant Board of Public Works fraudulently, or by mistake, or by undue influence exerted upon it."

In paragraph 8, it was alleged that Mrs. Kerpelman, the plaintiff, and "all others similarly situated" will be and have been irreparably injured and damaged by the two conveyances mentioned "in that valuable property, which is ecologically irreplaceable, owned by them or held in trust for them" by the Board, has been disposed of and closed off to the wild natural resource cycle of which it was a "most essential, irreplaceable part." The plaintiff and all others similarly situated are deprived of their use and benefit of these lands for "a totally inadequate contribution by new owners of the said lands into the state treasury by way of real estate taxes paid and to be paid, the value of which taxes will never compensate for the deprivation of said lands and the irreparable damage and injury which will be caused to the natural products and natural resources of the State of Maryland by the ecological disruption caused by the filling and loss of said wetlands, marshlands and shallows; which disruption may reasonably be expected to cause or substantially contribute to, natural resource and wildlife losses of many millions of dollars measured in financial terms alone."

Paragraphs 9 and 10 allege that Maryland Marine and James B. Caine, Inc. are "proceeding with great speed to fill in and eradicate as marshlands and wetlands" the lands in question and that the plaintiff has no adequate remedy at law.

The prayers for relief are that:

1. The case be advanced for immediate trial and hearing on any motions filed.

2. A mandatory injunction be issued requiring Maryland Marine and James B. Caine, Inc. to reconvey to the State of Maryland the lands in question.

3. The Court declare that the conveyances of the lands in question be declared to be null, void and of no effect and that "title remains in the People of Maryland."

4. The plaintiff have other and further relief.

Maryland Marine filed a demurrer to the bill of complaint on October 20, 1969, alleging three grounds for demurrer:

1. No facts were alleged sufficient to constitute a cause of action or entitling the plaintiff to any of the relief prayed for in the bill of complaint.

2. The plaintiff failed to allege facts sufficient to establish her standing to sue in the case.

3. The plaintiff is barred by laches.

The Board, on October 21, 1969, also filed a demurrer stating in allegations 1 through 4 that no cause of action in equity was alleged entitling the plaintiff to the relief prayed for in the bill of complaint; that the Statute (set out in full) imposed no limitation upon the power

of the Board to dispose of the property involved in the suit and the Board was authorized as a matter of law to dispose of that property.

5. There was no allegation that the alienation of State property was not "'for a consideration adequate in the opinion'" of the Board as provided in the Statute.

6. There were no allegations that the procedure used by the Board in connection with the disposition of the property was "improper, defective or in any manner contrary to law."

7. The exercise of the Board's discretion, if not exercised fraudulently or corruptly, is not subject to review by a court of equity.

After the submission of legal memoranda by counsel for the parties and argument, the Chancellor, in a well-considered, written opinion concluded, inter alia, that the demurrers should be sustained, without leave to amend, because the General Assembly had properly amended the common law by the Statute which gave the Board the power and discretion to make the conveyances in question and that the "strict trust theory" proposed by the plaintiff was not applicable. The Chancellor did not find it necessary to consider the standing of the plaintiff to sue.

As we have indicated, we find the threshold question of the standing of Mrs. Kerpelman to sue to be the determining issue in the appeal and, inasmuch as we are of the opinion that she has alleged no facts which entitle her to sue, we shall affirm the Chancellor's order of August 31, 1970, for this reason rather than for the reasons considered in the Chancellor's opinion about which we express

no opinion. Cf. Citizens Committee v. County Commissioners, 233 Md. 398, 197 A.2d 108 (1964).

Mrs. Kerpelman first alleges her standing to sue as a taxpayer of the State of Maryland, residing in Baltimore City. There is no allegation that she is a taxpayer of Worcester County and, as a resident of Baltimore City, the inference would be that she was not a Worcester County taxpayer. Whatever interest she has in the subject matter as a taxpayer of the State generally is the interest which any other taxpayer of the State generally has in that subject matter. The property in question is located in Worcester County but Mrs. Kerpelman alleges no interest in that property as a local taxpayer.

In this type of situation, Judge McWilliams, for the Court, stated the applicable rule in regard to the standing of a taxpayer to sue in Stovall v. Secretary of State, 252 Md. 258, 263, 250 A.2d 107, (1969), as follows:

"In Maryland taxpayers have standing to challenge the constitutionality of a statute when the statute as applied increases their taxes, but if they cannot show a pecuniary loss or that the statute results in increased taxes to them, they have no standing to make such a challenge."

See also Murray v. Comptroller, 241 Md. 383, 391, 216 A.2d 897 (1966); Citizens Committee v. County Commissioners, 233 Md. 398, 197 A.2d 108 (1964); and Baltimore v. Gill, 31 Md. 375, 394 (1869).

When the allegations of the bill of complaint are considered, it appears that the challenged transactions have - or will - result

in the placing of additional land on the tax rolls which will increase the tax base of the State so that the State taxes paid by Mrs. Kerpelman will actually be reduced as a result of those transactions. There are general allegations that the conveyances will have a damaging effect upon the marine ecology of the State, but there are no allegations of facts which would support these general allegations and, in any event, there are no allegations which indicate how this will result in the payment of higher State taxes by Mrs. Kerpelman.

The allegations of the bill of complaint rather indicate that Mrs. Kerpelman is concerned with the policy of the State of Maryland in regard to the preservation of the marshlands and wetlands,² and opposes the policy existing when the bill of complaint was filed. Her interest in this aspect of the matter, however, is not alleged to be different from that generally of citizens of the State; and this Court has held that there must be allegations (and ultimate proof) of a special interest, different from the general interest of a member of the public, in the plaintiff to enable a plaintiff to challenge a statute or the action of public officials acting under a statute. Houck v. Wachter, 34 Md. 265, 6 Am.Rep. 332 (1871) which has been cited and followed in over twenty-five Maryland cases including Bauernschmidt v. Standard Oil Co., 153 Md. 647, 139 A. 531 (1927) and most recently Rogers v. Md. - Nat'l Cap. P. & P. Comm'n, 253 Md. 687, 253 A.2d 713 (1969).

2. The General Assembly of Maryland by Chap. 241 of the Laws of 1970 has effectuated substantial changes in the State's policy in this regard.

An analogous case to the present case is Citizens Committee v. County Commissioners, supra, in which persons opposed to the policy of the State in regard to slot machines in Anne Arundel County sought, as taxpayers, to challenge the validity of the Maryland Statutes and Anne Arundel County Ordinances permitting the licensing of slot machines. There were allegations of general injury to the State from the operation of these gaming devices; but we held that, inasmuch as the allegations and proof indicated that the revenue derived by the County from such licensing decrease the County tax rate and the taxes payable by the plaintiffs in the Citizens Committee case, the plaintiffs, as taxpayers, had no standing to sue and that, as members of the public, they had no standing to sue because their alleged injury was no different from that suffered generally by the public, and there must be an allegation and ultimate proof of special injury to establish standing to sue.

The instant case is to be distinguished from our decision in Thomas v. Howard County, Maryland, Md. , A.2d (1971) [No. 353, September Term, 1970, decided April 12, 1971], in which the allegations of the bill of complaint were sufficient to establish, prima facie, injury to the plaintiffs as taxpayers and there were no allegations on the face of the bill of complaint indicating that the challenged action resulted in a decrease, but that it increased the taxes payable by the plaintiffs.

Mrs. Kerpelman, secondly, in paragraphs 2 and 3 of the bill of complaint seeks to establish her standing to sue upon the novel

theory that she, as a member of the public of Maryland, is a ~~XXXXXX~~ beneficiary of a "public trust" flowing from Art. 6 of the Declaration of Rights of the Maryland Constitution stating that persons invested with the legislative or executive powers of government "are Trustees of the Public, and, as such, accountable for their conduct...."

Article 6 is hortatory in nature - see Bernstein v. Board of Education of Prince George's County, 245 Md. 264, 226 A.2d 243, 248 (1967) - and sets forth the well-established doctrine that the duties of public officials are fiduciary in character and are to be exercised as a public trust. The lands in Maryland covered by water were granted to the Lord Proprietor by Section 4 of the Charter from King Charles I to Caecillius Calvert, Baron of Baltimore, his heirs, successors and assigns, who had the power to dispose of such lands, subject to the public rights of fishing and navigation. Brown v. Kennedy, 5 H. & J. 195 (1821). By virtue of Art. 5 of the Declaration of Rights in the Maryland Constitution, the inhabitants of Maryland became entitled to all property derived from and under the Charter and thereafter the State of Maryland had the same title to, and rights in, such lands under water as the Lord Proprietor had previously held. These lands were held by the State for the benefit of the inhabitants of Maryland and this holding is of a general fiduciary character. Art. 6 of the Declaration of Rights, however, does not purport to change, modify or enlarge the nature of this holding by the State or to give to a citizen of Maryland any different status to challenge a statute or the activities of public officials acting under a statute

than exists in regard to any other matters of State concern. No decision of this Court is cited to sustain the construction of Art. 6 urged upon us by Mrs. Kerpelman and we know of no such decision. In our opinion, it would be an unwarranted departure from our decisions and those of our predecessors, already mentioned, on the subject of standing to challenge the constitutionality or application of a statute, to adopt the construction of Art. 6 urged upon us by the appellant. Her remedy, as a member of the general public without suffering injury as a taxpayer or having a special interest in the subject matter, lies with the legislative branch of the State government and not with the courts.

ORDER OF AUGUST 31, 1970, AFFIRMED,
THE APPELLANT TO PAY THE COSTS.

M. G. G. G.

MANDATE

Court of Appeals of Maryland

No. 364 , September Term, 1970

Elinor H. Kerpelman

v.

Board of Public Works
of Maryland et al.

Appeal from the Circuit Court for
Worcester County.
Filed: October 28, 1970.
October 30, 1970: Motion to dismiss
appeal filed by James B. Caine, Inc.,
one of appellees.
November 16, 1970: Motion to dismiss
granted and that appeal dismissed.
April 12, 1971: Order of August 31,
1970, affirmed, the appellant to pay
the costs. Opinion by Barnes, J.

STATEMENT OF COSTS:

In Circuit Court:

Record \$25.00
Stenographer's Costs -

In Court of Appeals:

Filing Record on Appeal \$ 20.00
Printing Brief for Appellant NOT SUPPLIED
Reply Brief
Portion of Record Extract — Appellant
Appearance Fee — Appellant 10.00

Printing Brief for Appellee (Md. Marine Properties) 212.19
Printing Brief for Appellee (Bd. of Public Works) . . . 22.56
Portion of Record Extract — Appellee
Appearance Fee — Appellee (2) 20.00

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed
the seal of the Court of Appeals, this twelfth
day of May A. D. 1971.

Clerk of the Court of Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE

ELINOR H. KERPELMAN	:	IN THE
Appellant	:	COURT OF APPEALS
v.	:	OF
BOARD OF PUBLIC WORKS OF MARYLAND, et al.	:	MARYLAND
Appellees	:	September Term, 1970
	:	No. 364
:::	:	:::
:::	:	:::

STIPULATION

IT IS HEREBY STIPULATED, by and between the attorneys for the respective parties hereto, that the time for filing of brief of Appellee, Board of Public Works of Maryland, and the time for filing of brief of Appellee, Maryland Marine Properties, Inc., be and the same hereby is extended to and including January 27, 1971, and the time for filing reply brief of Appellant be, and the same hereby is, extended to and including February 20, 1971.

Leonard J. Kerpelman
 Leonard J. Kerpelman
 2403 Rogers Building
 Baltimore, Maryland 21209
 Attorney for Appellant

Thomas P. Perkins
 Thomas P. Perkins
 Venable, Baetjer & Howard
 1800 Mercantile Bank & Trust Bldg.
 Baltimore, Maryland 21201
 Attorneys for Maryland Marine
 Properties, Inc.,

Francis B. Burch
 Francis B. Burch
 Attorney General

Jon F. Oster
 Jon F. Oster
 Assistant Attorney General
 1200 One Charles Center
 Baltimore, Maryland 21201
 Attorneys for Board of Public
 Works of Maryland

ELINOR H. KERPELIMAN	:	IN THE
Appellant	:	COURT OF APPEALS
v.	:	OF
BOARD OF PUBLIC WORKS OF MARYLAND, et al.	:	MARYLAND
Appellees	:	September Term, 1970
	:	No. 364

::: ::: ::: :::

STIPULATION

IT IS HEREBY STIPULATED, by and between the attorneys for the respective parties hereto, that the time for filing of brief of Appellee, Board of Public Works of Maryland, and the time for filing of brief of Appellee, Maryland Marine Properties, Inc., be and the same hereby is extended to and including January 27, 1971, and the time for filing reply brief of Appellant be, and the same hereby is, extended to and including February 20, 1971.

Leonard J. Kerpelman
2403 Rogers Building
Baltimore, Maryland 21209
Attorney for Appellant

Thomas P. Perkins
Venable, Baetjer & Howard
1800 Mercantile Bank & Trust Bldg.
Baltimore, Maryland 21201
Attorneys for Maryland Marine
Properties, Inc.,

Francis B. Burch
Attorney General

Jon F. Oster
Assistant Attorney General
1200 One Charles Center
Baltimore, Maryland 21201
Attorneys for Board of Public
Works of Maryland

Order

IN THE COURT OF APPEALS OF MARYLAND

ELINOR H. KERPELMAN	:	
	:	
Complainant	:	
	:	
vs.	:	
	:	
HON. MARVIN MANDEL, Governor, et al, Constituting the Board of Public Works of Maryland,	:	No. 364
	:	
JAMES B. CAINE, INC. and MARYLAND MARINE PROPERTIES, INC.	:	September Term
	:	
Defendants	:	
	:	

Gentlemen:

Now comes the Appellant, and, pursuant to Rule 828c.2. (although agreement is not strictly impossible, but less practical than this method), and designates the following parts of the record which the Appellant proposes to include in the printed Extract:

1. Bill of Complaint for a Mandatory Injunction, etc.
2. Demurrer of Defendant Maryland Marine Properties, Inc.
3. Demurrer of Board of Public Works.
4. Motion Raising Preliminary Objection (filed October 21, 1969).
5. Motion for Summary Judgment Upon Some Issues (filed May 11, 1970).
6. Demurrer of Defendant James B. Caine, Inc.
7. Order of Court and Opinion contained therein (filed August 31, 1970).
8. Docket Entries.
9. The Appellant reserves the right to print further material, which

may have been overlooked.

Leonard J. Kerpelman
Attorney for Appellant

I HEREBY CERTIFY that a copy of the foregoing was mailed this 4th day of November, 1970, to Lee W. Bolts, Esq., P. O. Box 127, Berlin, Maryland; Hon. Francis B. Burch, Attorney General, 1200 One Charles Center, Baltimore, Maryland, 21201; Hon. Jon P. Oster, Assistant Attorney General, 1200 One Charles Center, Baltimore, Maryland 21201; Richard M. Pollitt, Esq., 110 N. Division Street, Salisbury, Maryland 21801; Raymond D. Costes, Esq., 4 Broad Street, Berlin, Maryland 21811; Thomas P. Perkins, III, Esq., 1800 Mercantile Bank and Trust Bldg, 2 Hopkins Plaza, Baltimore, Maryland, 21201; and to Robert A. Shelton, Esq., 1800 Mercantile Bank and Trust Bldg., 2 Hopkins Plaza, Baltimore, Maryland 21201.

/s/ Leonard J. Kerpelman

Leonard J. Kerpelman
Attorney for Appellant

REVIE TWA DEPT

NOV 10 1970

RECEIVED

IN THE COURT OF APPEALS OF MARYLAND.

Elinor H. Kerpelman, :
 Complainant, :
 vs. : No. 364
 Hon. Marvin Mandel, Governor, :
 et al, :
 Constituting the Board of Public : September Term
 Works of Maryland, :
 James B. Caine, Inc., :
 and :
 Maryland Marine Properties, :
 Inc., :
 Defendants. :

MOTION TO DISMISS APPEAL

James B. Caine, Inc., Appellee, by Sanford and Bolte, its Attorneys, moves this Honorable Court, pursuant to Maryland Rule 835, subsection b (3), that this Appeal be dismissed as to said Appellee. The grounds of the Motion are as follows:

1. No Order for Appeal was filed with the Clerk of the Court below within thirty (30) days from the date of the Order appealed from, as prescribed by Maryland Rule 812, the aforesaid Order in favor of the Defendants, having been entered on September 22, 1970, and the Appeal therefrom having been filed on October 26, 1970. The Appeal should therefore be dismissed under Rule 835, subsection b (3).

Appellee further desires that this Motion be set down for oral argument in advance of the argument on the merits. Said Appellee believes that the grounds of the Motion are such that the disposition of this Motion will make argument on the merits unnecessary as to said Appellee.

SANFORD and BOLTE

BY LS
 Lee W. Bolte
 P.O. Box 127
 Berlin, Maryland
 Phone: 641-0700 or 0701
 Attorney for James B. Caine, Inc

21VIE TWM DEBT
 OCT 30 1970
 RECEIVED

ORDER

It is, this _____ day of _____, A.D. 1970, by
the Court of Appeals of Maryland, ORDERED:

1. That the foregoing Motion to Dismiss Appeal of James
B. Caine, Inc., one of the Appellees herein, be, and the same is hereby
granted.

2. That said Appeal as to said Appellee be, and the same
is hereby dismissed.

Judges.

I HEREBY CERTIFY, that on this 29th day of October, 1970,
an exact duplicate copy of the foregoing Motion to Dismiss Appeal and
proposed Order thereon was mailed by regular United States mail, postage
prepaid, to the following:

1. Leonard J. Kerpelman, Esquire
2403 Rogers Building
Baltimore, Maryland 21209
2. Honorable Francis B. Burch
Attorney General
1200 One Charles Center
Baltimore, Maryland 21201
3. Honorable Jon F. Oster
Assistant Attorney General
1200 One Charles Center
Baltimore, Maryland 21201
4. Richard M. Pollitt, Esquire
~~110 North Division Street~~
Salisbury, Maryland 21801
5. Raymond D. Coates, Esquire
4 Broad Street
Berlin, Maryland 21811
6. Thomas P. Perkins, III, Esquire
Venable, Baetjer and Howard
1800 Mercantile Bank & Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201
7. Robert A. Shelton, Esquire
Venable, Baetjer and Howard
1800 Mercantile Bank & Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201

LS

Lee W. Bolte

FILED

IN THE COURT OF APPEALS OF MARYLAND.

1970

Elinor H. Kerpelman, :

Complainant, :

vs. :

Hon. Marvin Mandel, Governor, :

et al, :

Constituting the Board of Public :

Works of Maryland, :

James B. Caine, Inc., :

and :

Maryland Marine Properties, :

Inc., :

Defendants. :

J. LLOYD ... CLERK
COURT OF APPEALS
OF MARYLAND

No. 364

September Term

MOTION TO DISMISS APPEAL

James B. Caine, Inc., Appellee, by Sanford and Bolte, its Attorneys, moves this Honorable Court, pursuant to Maryland Rule 835, subsection b (3), that this Appeal be dismissed as to said Appellee.

The grounds of the Motion are as follows:

1. No Order for Appeal was filed with the Clerk of the Court below within thirty (30) days from the date of the Order appealed from, as prescribed by Maryland Rule 812, the aforesaid Order in favor of the Defendants, having been entered on September 22, 1970, and the Appeal therefrom having been filed on October 26, 1970. The Appeal should therefore be dismissed under Rule 835, subsection b (3).

Appellee further desires that this Motion be set down for oral argument in advance of the argument on the merits. Said Appellee believes that the grounds of the Motion are such that the disposition of this Motion will make argument on the merits unnecessary as to said Appellee.

SANFORD and BOLTE

BY: 

Lee W. Bolte
P.O. Box 127
Berlin, Maryland
Phone: 641-0700 or 0701
Attorney for James B. Caine, Inc.

ORDER

It is, this 16th day of November, A.D. 1970, by
the Court of Appeals of Maryland, ORDERED:

1. That the foregoing Motion to Dismiss Appeal of James
B. Caine, Inc., one of the Appellees herein, be, and the same is hereby
granted.

2. That said Appeal as to said Appellees be, and the same
is hereby dismissed.

/s/ Hall Hammond

Chief Judge

Judges.

I HEREBY CERTIFY, that on this 25th day of October, 1970,
an exact duplicate copy of the foregoing Motion to Dismiss Appeal and
proposed Order thereon was mailed by regular United States mail, postage
prepaid, to the following:

1. Leonard J. Kerpelman, Esquire
2403 Rogers Building
Baltimore, Maryland 21209
2. Honorable Francis B. Burch
Attorney General
1200 One Charles Center
Baltimore, Maryland 21201
3. Honorable Jon F. Oster
Assistant Attorney General
1200 One Charles Center
Baltimore, Maryland 21201
4. Richard M. Pollitt, Esquire
110 North Division Street
Salisbury, Maryland 21801
5. Raymond D. Coates, Esquire
4 Broad Street
Berlin, Maryland 21811
6. Thomas P. Perkins, III, Esquire
Venable, Baetjer and Howard
1800 Mercantile Bank & Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201
7. Robert A. Shelton, Esquire
Venable, Baetjer and Howard
1800 Mercantile Bank & Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201



Lee W. Bolte

Elinor H. Kerpelman : In the Circuit Court for
 Complainant :
 VS : Worcester County, Maryland.
 Hon. Marvin Mandel, Governor, :
 al, : No. 8934 Chancery
 Constituting the Board of :
 Public Works of Maryland, :
 James B. Caine, Inc., :
 and :
 Maryland Marine Properties, :
 Inc., :
 Defendants. :
 :
 : October 8, 1970

Gentlemen:

Take notice that the record in the above-named case is ready for inspection and transmission to the Court of Appeals of Maryland, and can be forwarded upon payment of costs and receipt of check in the amount of twenty dollars (\$20.00), made payable to the Clerk of the Court of Appeals.

Sincerely yours,

Frank W. Hales, Jr.
 Frank W. Hales, Clerk

Notice to:

Leonard J. Kerpelman, Esquire
 2403 Rogers Building
 Baltimore, Maryland 21209

Honorable Francis B. Burch
 Attorney General
 1200 One Charles Center
 Baltimore, Maryland 21201

Honorable Jon F. Oster
 Assistant Attorney General
 1200 One Charles Center
 Baltimore, Maryland 21201

Richard M. Pollitt, Esquire
 110 North Division Street
 Salisbury, Maryland 21801

Lee W. Bolte, Esquire
 Sanford & Bolte
 Main Street
 Berlin, Maryland 21811

(continued to next sheet)

FILED
 OCT 8 4 21 PM '70
 FRANK W. HALES, JR., CLERK
 CL. OF APPEALS CO.

Notice to: (continued)

Raymond D. Coates, Esquire
4 Broad Street
Berlin, Maryland 21811

Thomas P. Perkins, III, Esquire
1400 Mercantile Trust Building
Baltimore, Maryland 21202

Robert A. Shelton, Esquire
1400 Mercantile Trust Building
Baltimore, Maryland 21202

FILED
OCT 8 4 28 PM '70
FRANK
CT. CL. H. R. CO.

12 *Costs*

IN THE CIRCUIT COURT FOR WORCESTER COUNTY, MARYLAND

ELINOR H. KERPELMAN	:	
	:	
Complainant	:	
	:	
vs.	:	89 3/4 Equity
	:	
MARVIN MANDEL, Governor, et al	:	
	:	
Respondents	:	

ORDER FOR APPEAL

Mr. Clerk:

Please enter an appeal to the Court of Appeals of Maryland in the above-entitled case, from the final judgment and Order of Court dated August 31, 1970.

Leonard J. Kerpelman
Attorney for Complainant

I HEREBY CERTIFY that copies of the foregoing Order for Appeal were mailed this 12th day of September, 1970, to: Lee W. Bolte, Esq., Maine Street, Berlin, Maryland; Robert A. Shelton, Esq., and Thomas P. Perkins, III, Esq., 1400 Mercantile Trust Bldg., Baltimore, Md. 21202; Raymond D. Coates, Esq., 4 Broad St., Berlin, Md. 21811; Hon. Francis B. Burch, Attorney General, and Jon F. Oster, Esq., 1200 One Charles Center, Baltimore, Md. 21201; and Richard M. Pollitt, Esq., 110 N. Division St., Salisbury, Md., attorneys for Respondents.

LB
Leonard J. Kerpelman
Attorney for Complainant

RECEIVED
SEP 28 1970
CIVIL LAW DEPT

IN THE CIRCUIT COURT FOR WORCESTER COUNTY, MARYLAND

ELINOR H. KERPELMAN,

Complainant,

vs.

HON. MARVIN MANDEL,
Governor, et al.,

Defendants.

:
:
:
:
:
:
:

In Equity

Cause No. 8934

DEMURRER OF DEFENDANT JAMES B. CAINE, INC.

James B. Caine, Inc., one of the Defendants, by Sanford and Bolte, its attorneys, demurs to the Bill of Complaint filed herein and to each and every paragraph thereof, and as grounds for said Demurrer states as follows:

- 1. Plaintiff has **totally** failed to allege any facts which would be sufficient to constitute a cause or action or entitle hereto the relief as prayed in the **Bill of Complaint**.
- 2. Plaintiff has **totally** failed to allege sufficient facts to establish her standing to sue in this case.
- 3. Plaintiff is barred by laches.

In support of said Demurrer, this **Defendant** adopts the arguments heretofore made by the other Defendants herein, and also the Opinion of this Honorable Court relating to such Demurrers, which is dated August 31, 1970 and filed in this proceeding.

WHEREFORE, Defendant James B. Caine, Inc. prays this Honorable Court to sustain its Demurrer without leave to amend, to the end that the Complainant pay the costs of this proceeding.

SANFORD and BOLTE

BY: LS/
Lee W. Bolte

I HEREBY CERTIFY, that on this 22nd day of September, 1970, an exact duplicate copy of the foregoing Demurrer was mailed, by regular United States mail, postage prepaid, to the following:

1. Leonard J. Kerpelman, Esquire, Attorney for the Plaintiffs and the North American Habitat Preservation Society and R. Doyle Grabarck, Petitioners, 500 Equitable Building, Baltimore, Maryland 21202.

2. Robert A. Shelton, Esquire, and Thomas P. Perkins, III, Esquire, 1400 Mercantile Trust Building, Baltimore, Maryland, 21202, Attorneys for Defendant Maryland Marine Properties, Inc.

3. Raymond D. Coates, Esquire, 4 Broad Street, Berlin, Maryland, 21811, Attorney for Maryland Marine Properties, Inc.

4. Honorable Francis B. Burch, Attorney General, and Jon F. Oster, Esquire, 1200 One Charles Center, Baltimore, Maryland, 21201, Attorneys for the Board of Public Works.

5. Richard M. Pollitt, Esquire, Pollitt, Hughes & Bahen, 110 N. Division Street, Salisbury, Maryland 21801, Attorney for Board of Public Works.

SANFORD and BOLTE

BY: LS

Lee W. Bolte

IN THE CIRCUIT COURT FOR WORCESTER COUNTY, MARYLAND

ELINOR H. KERPELMAN,	:	
	:	
Complainant	:	In Equity
	:	
vs.	:	
	:	Cause No. 8934
HON. MARVIN MANDEL	:	
Governor, et al.	:	
	:	
Defendants	:	

ANSWER TO PETITION TO INTERVENE

James B. Caine, Inc., one of the Defendants, by Sanford and Bolte, its attorneys, in answer to the Petition to Intervene and Order to Show Cause issued thereon, opposes such intervention on the grounds that the Intervenor, North American Habitat Preservation Society has no proper standing to intervene (Horace Mann League vs. Board, 242 Md. 645, at page 652; Citizens Committee vs. County Commissioners, 233 Md. 398; Bar Association vs. District Title Co. 224 Md. 474, and Greenbelt vs. Jaeger, 237 Md. 456) and that the status of R. Doyle Grabarck, the other Intervenor, to intervene is not adequately set forth in said Petition.

WHEREFORE, Defendant, James B. Caine, Inc. prays this Honorable Court to deny the Petition to Intervene.

SANFORD and BOLTE

BY: LS
 Lee W. Bolte

I HEREBY CERTIFY that on this 22ND day of September, 1970, an exact duplicate copy of the foregoing was mailed, by regular United States Mail, postage prepaid, to the following:

1. Leonard J. Kerpelman, Esquire, Attorney for the Plaintiffs and the North American Habitat Preservation Society and R. Doyle Grabatzk, Petitioners, 500 Equitable Building, Baltimore, Maryland 21202.

2. Robert A. Shelton, Esquire, and Thomas P. Perkins, III, Esquire, 1400 Mercantile Trust Building, Baltimore, Maryland, 21202, Attorneys for Defendant Maryland Marine Properties, Inc.

3. Raymond D. Coates, Esquire, 4 Broad Street, Berlin, Maryland, 21811, Attorney for Maryland Marine Properties, Inc.

4. Honorable Francis B. Burch, Attorney General, and Jon F. Oster, Esquire, 1200 One Charles Center, Baltimore, Maryland, 21201, Attorneys for the Board of Public Works.

5. Richard M. Pollitt, Esquire, Pollitt, Hughes & Bahen, 110 N. Division Street, Salisbury, Maryland, 21801, Attorney for Board of Public Works.

SANFORD AND BOLTE

BY:

Lee W. Bolte

which may be filed.

- (b) That a Mandatory Injunction may issue, requiring the Defendants, Maryland Marine Properties, Inc., and James B. Caine, Inc., to reconvey to The State of Maryland those lands in Worcester County which are the subject of the within suit.
- (c) That the Court declare the Deeds of Conveyance or Mesne Deeds of Conveyance made by the Board of Public Works of Maryland of lands in Worcester County, Maryland, unto Maryland Marine Properties, Inc., and James B. Caine, Inc., which conveyances were made in 1968, of 197 acres and 190 acres, respectively, more or less, to be null, void, and of no effect, and that title remains in the People of Maryland."

To this Bill of Complaint, the Defendant Maryland Marine Properties, Inc. filed its Demurrer on October 20, 1969, together with an extensive memorandum raising three specific issues; namely, (1) a failure to allege sufficient facts to constitute a cause of action, (2) attacking the standing to sue of the Plaintiff, and (3) raising the question of laches. On October 21, 1969, the Defendant Board of Public Works filed its Demurrer citing the provisions of Section 15 of Article 78A of The Annotated Code of Maryland, and the authority of the Board of Public Works of Maryland as therein set forth, contending that, in the absence of any allegation of fraud or the facts supporting such an allegation, no cause of action was sufficiently stated to subject the actions of the Board of Public Works to the scrutiny of a Court of Equity.

On October 21, 1969, James B. Caine, Inc., one of the Defendants, filed a "Motion Raising Preliminary Objection", alleging the lack of jurisdiction of this Court over the subject matter of the Bill, on the grounds that a determination involved a "political

question", and "not a justiciable question".

On November 6, 1969, the Complainant filed a "Reply To 'Memorandum of Law of Maryland Marine In Support of Demurrer'".

On November 7, 1969, the Complainant filed a "Motion Ne Recipiatur To Demurrer Of Maryland Marine", based upon the contention that the Demurrer raised a question of laches which should be considered as a factual defense rather than a subject of a demurrer.

On November 17, 1969, the Complainant filed an "Answer To Motion Raising Preliminary Objection", denying the nature of the question to be "political", and summarizing the contentions of the Bill as being (a) that the Board of Public Works enjoyed no alienable title to the lands in question, (b) that "[t]he conveyance was for such a completely and totally inadequate consideration, that the Board of Public Works could not have had a bona fide opinion that the consideration was adequate, and therefore fraud is inferred by the Complainant".

On January 26, 1970, an organization allegedly known as "North American Habitat Preservation Society" filed a "Petition To Intervene As Plaintiffs", upon which the Court issued a Show Cause Order to the Defendants ordering them to show cause on or before February 16, 1970, if any they had, why the said Petition to Intervene should not be granted. The Defendant Maryland Marine Properties, Inc., filed its Answer to the Petition to Intervene, on February 24, 1970, alleging insufficient facts to establish the standing of the Petitioners to sue. On February 27, 1970, the Defendant, James B. Caine, Inc., filed a "Motion Ne Recipiatur As To Petition To Intervene As Plaintiffs", alleging the non-receipt of a copy of the said Petition, the existence of which the attorney for the said Defendant allegedly accidentally discovered in the office of the Clerk of this Court, on February 24, 1970.

On March 11, 1970, the Complainant filed a "Motion Ne Recipiatur" to the Motion Ne Recipiatur of the Defendant James B. Caine, Inc., founded upon the grounds that the Caine Motion was based upon "facts not apparent from the face of the record, and yet was not under affidavit". Interestingly enough, no copy of the Complainant's Motion Ne Recipiatur was apparently served upon the Defendant James B. Caine, Inc., or any of his attorneys until May 13, 1970, after which an amended certificate of mailing was apparently intended to be filed by the attorney for the Complainant on March 16, 1970.

On May 5, 1970, the Plaintiff filed a Memorandum of Law, the main body of which was a photo-copy of a memorandum filed, on September 15, 1969, in a similar case in the Circuit Court for Baltimore City.

On May 6, 1970, the Defendant James B. Caine, Inc., filed a "Memorandum In Support Of Preliminary Objection", the main body of which was a photo-copy of a brief filed in the same similar case in the Circuit Court for Baltimore City.

On May 11, 1970, the Complainant filed a "Motion For Summary Judgment Upon Some Issues", alleging "no dispute as to any material fact concerning the following issues"; namely, (a) [t]hat she is a taxpayer of the State of Maryland, (b) [t]hat she is a resident thereof in Baltimore City, and (c) [t]hat this suit is brought on her own behalf, and on behalf of all others similarly situated."

The Hearing was held on May 11, 1970 on all Demurrers, Motions, Petitions, etc., consistent with the notice of the assignment thereof mailed to all parties on April 8, 1970.

On May 15, 1970, the Complainant filed an "Answer To Memorandum Of Law Of Defendant James B. Caine, Inc.", in which the Complainant suggested that "counsel has missed the point", because of the contention of the Complainant that "nobody" has an alienable

title to the lands in question.

On June 17, 1970, the Complainant filed a "Supplementary Plaintiff's Memorandum Of Law", in which the Complainant stated to the Court that she was adopting the entire theory set forth in the case of Commonwealth of Virginia vs. City of Newport News, 164 S.E. 689, at page 696, and quoted from that case the theory upon which she relied.

PETITION TO INTERVENE

The first duty of the Court is obviously to dispose of the Petition to Intervene filed on behalf of the "North American Habitat Preservation Society", for whom Leonard J. Kerpelman, Esq. is "solicitor" as well as being the attorney for the Complainant. Based entirely upon the facts set forth in the said Petition as to the nature and composition of the said Society, and the interest which it has in this case, the Court has determined that it lacks standing to sue as a party Plaintiff, and therefore its Petition to Intervene would be denied. Horace Mann League vs. Board, 242 Md. 645, at page 652. Citizens Committee vs. County Commissioners, 233 Md. 398, Bar Association vs. District Title Co. 224 Md. 474, and Greenbelt vs. Jaeger, 237 Md. 456.

A certain R. Doyle Grabarck, Box 869, Adelphi, Maryland, 20783, has likewise joined as a Petitioner in the said Petition to Intervene, both as President of the said Society, and individually. As President of the Society, the Court would consider his capacity to sue to be co-existent with the Society, and of no greater magnitude. As an individual, however, he is apparently in the same position as the Complainant, Elinor H. Kerpelman, and the determination as to her standing will likewise be determinative of the standing of Mr. Grabarck. It seems also to follow that a determination of the contentions and issues raised by the Complainant would

likewise be determinative of the contentions and issues raised by Mr. Grabarck, particularly in view of the fact that each are represented by Mr. Kerpelman. Indeed, by paragraph 4 and 5 of the Petition to Intervene, the Petitioners have so stated, and have adopted the position of the Complainant. There is one major difference, however, between the Petitioner Grabarck and the Complainant Kerpelman. That difference is the fact that no where in the Petition to Intervene is it alleged that Mr. Grabarck is a taxpayer of the State of Maryland. The Petition to Intervene, therefore, by R. Doyle Grabarck, as an individual, will be, likewise, denied.

MOTIONS NE RECIPIATUR

The determination by the Court upon the Petition to Intervene, as hereinbefore set forth, makes unnecessary a consideration of the Motion Ne Recipiatur filed by the Defendant James B. Caine, Inc., or the Motion Ne Recipiatur filed by the Complainant to the Caine Motion Ne Recipiatur. It might be well for the Court to observe, however, that Counsel for the Complainant had due notice of the appearance of Lee W. Bolte, Esq., and the firm of Sanford and Bolte, on behalf of the Defendant James B. Caine, Inc., as early as October 21, 1969, upon the filing of the Caine Motion Raising Preliminary Objection. Mr. Kerpelman recognized this appearance in his service of November 4, 1969 of his "Reply", his Motion filed on November 7, 1969, and his Answer filed on November 17, 1969. He did ignore the appearance in his service of the said Petition to Intervene. The apparent failure of Counsel for Maryland Marine Properties, Inc., to receive a copy of the said Petition to Intervene is the fact that Mr. Kerpelman used an inadequate address therefor, according to his Certificate of Service, in that he omitted any reference to room numbers. The Clerk of this Court can hardly be held responsible for this defect in view of the fact that in his undated Certificate of Service of the said Petition to Intervene, Mr. Kerpelman alleged service upon a certain "Joseph H. Young, Esq., 901 First National

Bank Bldg., Baltimore, attorney for James B. Caine, Inc." The Clerk would have no way of knowing whether or not additional Counsel for the Caine Corporation was now in the case, and had simply failed to enter his appearance of record. Perhaps the Clerk, however, should be more careful, and require that the Certificate of Service by an attorney be dated, and that all attorneys of record be included within such Certificate.

MOTION RAISING PRELIMINARY OBJECTION

The Court should then next consider the preliminary objection raised by the Defendant James B. Caine, Inc., upon the question of whether or not the Bill of Complaint merely stated a political question, and not a justiciable issue. Granting that a reading of the Bill of Complaint would make it difficult to delineate a justiciable issue, and that the Bill appears to be more in the nature of a statement of a political position, requiring legislative attention or executive restraint, the memoranda subsequently filed on behalf of the Complainant have had the salutary effect of interpreting the meaning of the Bill of Complaint and articulating a position which presents a legal issue. In view of this subsequent elucidation, by counsel for the Complainant, the Court will entertain jurisdiction, and render a decision upon the issue as narrowly framed and presented to the Court by Complainant's Memoranda. The Motion of the Defendant James B. Caine, Inc., raising this preliminary objection will be overruled.

MOTION NE RECIPIATUR OF COMPLAINANT TO DEMURRER
OF MARYLAND MARINE PROPERTIES, INC.

The Court will entertain the Demurrer of the Defendant Maryland Marine Properties, Inc., and deny the Motion Ne Recipiatur filed thereto by the Complainant. In his Motion Ne Recipiatur thereto, Counsel for the Complainant has over simplified the law

with regard to the inclusion of a charge of laches in a demurrer.

"The defense of limitations or laches may be raised on demurrer where, on the face of the bill, it can be seen that it is a bar. Although, ordinarily, the defense of laches must be made by answer alleging facts showing lapse of time and prejudice to the Defendant, as discussed supra § 142, where the bill on its face shows both lapse of time and circumstances as suggest prejudice or acquiescence and call for explanation, the bill is demurrable." 9 M. L. E. "Equity", Section 152, and cases therein cited, including the 1969 Pocket Part.

The Court will concede that the question of whether or not a case of laches is presented within the four corners of the Bill of Complaint is indeed a close one, but if the question of laches was the only question before the Court for determination in this proceeding at this time, the Court would insist upon a Hearing to spread the facts upon the record, particularly as they relate to prejudice to the Defendant Maryland Marine Properties, Inc. The Court, therefore, would take the position that it would not sustain the Demurrer on that grounds alone, but defer it as a matter of defense. Such a position by the Court, however, does not dispose entirely of the matter now for determination. The fact that a demurrer contains an invalid, unsupported or otherwise irrelevant issue, or the fact that the grounds assigned do not meet the approval of counsel for the opposing party or the Court does not justify the rejection of the pleading in toto. Even if one of the grounds assigned in a demurrer is found to be lacking in legal efficacy, the remaining grounds, if any there be, survive and are entitled to the consideration of the Court. Such is the situation presented here.

DEMURRERS

The Court is well aware of, and has had several opportunities to apply, the position of the Court of Appeals of Maryland with regard to demurrers filed in opposition to petitions for declaratory relief. Kelley vs. Davis, 233 Md. 494. As mentioned early in this Opinion, however, this Court does not envision the Bill of Complaint in this case to state the grounds for, or the request for, a declaration of the rights of the parties. The declaration which the Complainant seeks is merely a declaration to support the issuance of the "Mandatory Injunction" which she prays. In other words, it would be necessary to "declare" invalid the conveyances referred to within the Bill and in prayer for relief "(c)" in order to grant the relief prayed in "(b)" of the prayers for relief. There is no basis for, or necessity for, any other, further, or fuller declaration of rights of the parties. The Court is, therefore, of the opinion that the rule against entertaining a demurrer to a petition for declaratory relief is not appropriate to this particular proceeding, and should not be applied hereto.

The Court will attempt to state the position of the Complainants insofar as it presents a legal issue to be resolved herein. The Complainant adopts the position that title to lands under tidal waters vested in the King of England, for the benefit of the nations, passed to the Colonies under the Royal Charters granted therefor, in trust for the communities to be established, and upon the American Revolution, passed to the original States to be held by the officials thereof in trust for the people within the boundaries of the respective States, subject only to the rights surrendered by the Constitution of the United States to the Federal Government for the regulation of navigation. The trust which she envisioned is one which covers the entire jus publicum and vests

in the trustee an irrevocable and inalienable title to such property. In support of her position in regard to such a trust, she narrowly construes the first portion of Article 6 of the Declaration of Rights of the Constitution of Maryland, of 1867, which reads:

"Art. 6. That all persons invested with the Legislative or Executive powers of Government are the Trustees of the Public, and, as such, accountable for their conduct: ..."

She is further contending that such being the alleged common law of England, the General Assembly of Maryland, or apparently any Provincial legislature, is not, and never has been, empowered or authorized to change or modify that common law. As authority for that provision, she cites a portion of the content of Article 5 of the Declaration of Rights of the Constitution of Maryland, of 1867, the portion which she cites being as follows:

"Art. 5. That the Inhabitants of Maryland are entitled to the Common Law of England, ...".

At this point, perhaps it would be well that the Court quote the remainder of Article 5 of the Declaration of Rights, with the emphasis by underlining being supplied by the Court:

"Art. 5. That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English Statutes as existed on the Fourth day of July, 1776; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, 1867; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, an amendment or repeal by, the Legislature, of this State. And, the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by His Majesty Charles I to Caecilius Calvert, Baron of Baltimore."

There is no substantial difference between that portion of the 1867 Constitution of Maryland and paragraph 3 of the Declaration of Rights of the First Constitution of Maryland, as reported by Kilty, Volume 1, The Laws of Maryland, 1799 Edition. It reads as follows:

"III. That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by jury according to the course of that law, and to the benefit of such of the English statutes as existed at the time of their first emigration and which by experience have been found applicable to their local and other circumstances, and of such others as have been since made in England or Great-Britain, and have been introduced, used and practiced by the Courts of Law or Equity; and also to all acts of assembly in force on the first of June, 1774, except such as may have since expired, or have been, or may be altered by acts of convention, or this declaration of rights; subject nevertheless to the revision of, and amendment or repeal by, the Legislature of this State; and also the Inhabitants of Maryland are also entitled to all property derived to them from or under the charter granted by His Majesty Charles I to Caecilius Calvert, Baron of Baltimore."

If, as Counsel for the Complainant has stated in his Supplementary Memorandum, the Court was impatient at the Hearing with the persistent argument of Counsel with regard to the elements of the Common Law doctrine, perhaps it was because of the clear exception in the Declaration of Rights as hereinbefore set forth, and the almost incontestable legal understanding that the Legislature of Maryland is at liberty, and in the conscientious performance of its duties, must, from time to time, change the Common Law through statutory enactments in order to meet the changing conditions of time and history. Lutz vs. State 167 Md. 12, Heath vs. State, 198 Md. 455, Goldenberg vs. Federal Finance, 150 Md. 298, 5 M.L.E. "Common Law", Section 3. The adoption of any proposition that would abrogate, nullify and destroy the great body of law in Maryland, including enactments of the General Assembly, except so much thereof as interpreted and applied the Common Law of England prior to 1776 and the treatment of subjects not contemplated by that common law, is so illogical, unreasonable, and disastrous in its consequences as to be almost incomprehensible. The Court supposes that this is the reason why the point had not been more frequently pressed upon the Courts of this State in the past.

The Court is indebted, however, to Counsel for the Complainant for urging upon the Court the controlling nature of the opinion of the Supreme Court of the United States in Shively vs. Bowlby,

14 Sup. Ct. 548, 152 U. S. 1. The Court willingly and delightedly adopts the decision therein to be determinative of the issues presented by the Complainant for resolution in this proceeding. Unfortunately, Counsel for the Complainant has misread the case, and has appropriated wording from that case, out of context, to attempt to support the position of the Complainant herein.

That case establishes the proposition that, consistent with the Common Law of England, the individual States inherited the sovereignty over lands under navigable waters within the State, and granted unto them control and regulation of riparian rights, which the States were free to alienate according to the constitution and statutes of the respective States. In a most helpful and extensive treatment of the entire subject matter of riparian rights as they existed within the original thirteen states, and as, by virtue of that opinion, extended to the new states admitted into the Union thereafter, the Supreme Court, in *Shively vs. Bowlby*, has furnished a source of history of the treatment of riparian rights of enormous magnitude, and through its study, one is oriented to the broad spectrum, and range of treatment, of the subject by the individual States. This concept is fundamental if one is to now attempt to define and understand riparian rights within the United States. Available treatises, encyclopedic compendiums, and conclusions based upon summaries of annotations must all be read and considered in the light of the cardinal principle that the decisions of the individual states are based upon the law as it had been established within the individual states, and unless the law in force in the State in which the appellate decision has been rendered is identical with that in Maryland, the decision of the foreign jurisdiction, or the interpretation of a federal tribunal based upon the law of that foreign jurisdiction, is neither persuasive nor controlling.

If the strict trust theory proposed by the Complainant is the law in other jurisdictions, it is certainly not the law in Maryland. Without belaboring the issue with the repetition of authorities recently enumerated and discussed by this Court in No. 8935 Chancery, the Court would merely observe that, beginning with the Acts of 1745 and continuing through the Acts of 1970, the Legislature of Maryland has recognized the existence of certain riparian rights in private land owners. A long line of judicial decisions of the Court of Appeals of Maryland and Federal Courts interpreting Maryland law, have protected, enforced, interpreted and arbitrated these rights, beginning, at least, in 1815, with The Wharf Case, reported in 3 Bland at page 361, and continuing through Causey vs. Gray, in 1968, reported in 250 Md. at page 380, and through November 12, 1969, in Western Contracting Corporation vs. Titter, reported in 255 Md. at page 581.

The most specific pronouncement of the General Assembly of Maryland, however, upon the narrow issue sought by the Complainant to be raised against The Board of Public Works of Maryland is contained in Section 15 of Article 78A of The Annotated Code of Maryland. Without quoting that lengthy section in full in this Opinion, since 1945, The Board of Public Works of Maryland has been granted specifically the following power:

"Any real or personal property of the State of Maryland or of any Board, Commission, Department or Agency thereof, and any legal or equitable rights, interests, privileges or easements, in, to, or over the same, may be sold, leased, transferred, exchanged, granted or otherwise disposed of to any person, firm, corporation, or to the United States, or any agency thereof, or to any Board, Commission, Department or other agency of the State of Maryland for a consideration adequate in the opinion of the Board of Public Works, or to any county or municipality in the State subject to such conditions as The Board of Public Works may impose . . . As used herein, the term 'real or personal property or any legal or equitable rights, interests, privileges for easements in, to, or over the same' shall include the inland waters of the State and land under said waters, as well as the land underneath the Atlantic Ocean for a distance of three miles from the low watermark of the coast of the State of Maryland bordering on said ocean, and the waters above said land . . ."

The language which Counsel for the Complainant has selected from Shively vs. Bowlby with regard to the imposition of a trust does not apply to the type of trust which the Complainant espouses. The factual situation in Shively vs. Bowlby presented the issue as to whether or not a purported grant from the United States of America, while the area was a territory under the jurisdiction of the Federal Government, took precedence over a grant by the State of Oregon for the same land. The Court determined that the United States had no power to make such a grant because the Federal Government held the land in trust pending the formation of the new State. If one will read the last ten paragraphs of that Opinion, the thrust of the entire opinion will become most evident. The type of trust referred to therein bears no resemblance to the type of trust here urged upon the Court.

The pleadings, memoranda, and arguments in this case have been filled with references to various possible disastrous consequences by the adoption of the position of one party or the other. The Court refuses to speculate, and does not base this Opinion upon any unproven allegations, either favorable or unfavorable to the Complainant, but, if one had the time, it might be an interesting mental exercise to conceive of replacing the shorelines of The State of Maryland to their composition and contour, and in all their pristine beauty, of the year 1634. Such would be the logical, if unreasonable, result should the theory of the Complainant be adopted, and the requested "Mandatory Injunction" issued by this Court.

Adapting, as she has, the theory of her cause of action, the Court can see no reasonably possible manner in which the Bill of Complaint can be amended to avoid its basic infirmity, nor any need for any further delay in granting an opportunity for such an amendment.

Having reached this decision in the matter, it becomes unnecessary to consider the standing of the Complainant to sue.

It is, therefore, this 31st day of August, 1970, by the Circuit Court for Worcester County, Maryland, ORDERED that:

1. The Petition to Intervene as Plaintiffs filed by the "North American Habitat Preservation Society" and R. Doyle Grabarck, President, and Individually, on January 26, 1970, is DENIED;
2. The Motion Ne Recipiatur filed by Defendant James B. Caine, Inc., to the said Petition to Intervene as Plaintiffs, on February 27, 1970, is DENIED;
3. The Motion Ne Recipiatur filed by Complainant to the said Motion Ne Recipiatur filed by the Defendant James B. Caine, Inc., on March 11, 1970, is DENIED;
4. The Motion Raising Preliminary Objection filed by the Defendant James B. Caine, Inc., on October 21, 1969, is DENIED;
5. The Motion Ne Recipiatur filed by Complainant to Demurrer of the Defendant Maryland Marine Properties, Inc., on November 7, 1969, is DENIED;
6. The Demurrer of Defendant Maryland Marine Properties, Inc., to the Bill of Complaint, filed on October 20, 1969, is SUSTAINED, without leave to the Complainant to amend;
7. The Demurrer of Defendant Board of Public Works to the Bill of Complaint, filed on October 21, 1969, is SUSTAINED, without leave to the Complainant to amend; and
8. The "Motion of Complainant for Summary Judgment Upon Same Issues" filed by the Complainant on May 11, 1970, being more in the nature of a Demand for Admission of Facts, (which would have been a more appropriate Pleading) is GRANTED, the facts therein having been

conceded in the absence of any response thereto by
the Defendants; and

9. The Complainant shall pay the costs of this proceeding.


DANIEL T. PRETTYMAN
Judge

TRUE COPY, TEST: *Frank W. Blake* **CLERK**

M. O. S.

IN THE CIRCUIT COURT FOR WORCESTER COUNTY, MARYLAND

ELMER H. KERPELMAN	:	
	:	
Plaintiff	:	
	:	In Equity
vs.	:	Case No. 8934
	:	
MARVIN MANDEL,	:	
Governor, et al	:	
	:	
Defendant	:	
	:	

SUPPLEMENTARY PLAINTIFF'S MEMORANDUM OF LAW

This Plaintiff's Memorandum is limited to the subject of whether the statute which created the Board of Public Works and gave it authority to dispose of all real estate, whether that statute repealed the common law, as was set forth in the other Memorandum filed heretofore, and, particularly, as is set forth in the case of Shively vs. Bowby, 152 U.S. 111, so frequently referred to in the Memorandum.

At the hearing which was held heretofore in the beautiful old town of Snow Hill, the beautiful old sentiment was expressed that the Plaintiff's position was bunk, because the common law had been altered by the act referred to creating the Board of Public Works.

The Plaintiff, having been thrown off stance by certain remarks of the Honorable Court, and not being a very clear thinker under conditions approaching apoplexy, had difficulty spinning out a theory in terms of the old cases, or of precedent sufficient to satisfy the Court that the common law had not been revoked. This effort was made somewhat difficult, it is submitted, also, by the Court's, shall it be said, "reluctance" to be regaled by citations to the common law.

However, the Plaintiff will again abdicate the effort to set forth a theory, and will, instead, adopt entire the theory set forth in the case of:

Commonwealth of Virginia vs. City of Newport News (1932), 164 U.S. 659, at 696.

That theory goes as follows, quoting from the case:

"(3) In so far as the sovereignty and governmental powers of the state are concerned, the object of the ordination of the Constitution is to provide for the exercise thereof and not the abdication thereof. It would therefore be a perversion of the Constitution to construe it as authorizing or permitting the Legislature or any other governmental agency to relinquish, alienate, or destroy, or substantially impair the sovereignty, or the sovereign rights, or governmental powers of the state. The police power, the power of right of eminent domain, and the power to make, alter and repeal laws are all attributes or inherent and inseparable incidents of sovereignty and the power to govern. For this reason, although no express provision may be found in a State Constitution forbidding the Legislature to surrender, alienate, abridge, or destroy these powers, there is always such a limitation to be implied from the object and purpose for which the Constitution was ordained. Of course, such sovereign powers must be exercised subject to such limitations upon exercise thereof by the Legislature as are provided in the Constitution.

"When we come to consider the powers of the state Legislature under the Constitution with reference to the public domain, it is necessary to take cognizance of the two different basic rights which the state has over and in the public domain.

"(4, 5) As sovereign, the state has the right of jurisdiction and dominion for governmental purposes over all the lands and waters within its territorial limits, including tidal waters and their bottoms. For brevity this right is sometimes termed the jus publicum. But it also has, as proprietor, the right of private property in all the lands and waters within its territorial limits (including tidal waters and their bottoms) of which neither it nor the sovereign state whose rights it has succeeded has divested itself. This right of private property is termed the jus privatum. Farmers on Waters and Water Rights, S. 10, S. 36a; Dough vs. Hall, 21 N.J.Law, 156; City of Oakland vs. Oakland, etc. Co., 118 Cal. 160, 50 P.277.

"The jus publicum and all rights of the people, which are by their nature inherent or inseparable incidents thereof, are incidents of the sovereignty of the state. Therefore, by reason of the objects of purposes for which it was ordained, the Constitution impliedly denies to the Legislature the power to relinquish, surrender, or destroy, or substantially impair

the jus publicum, or the rights of the people which are so grounded therein as to be inherent and inseparable incidents thereof, except to the extent that the State or Federal Constitution may plainly authorize it to do so. Farnham on Waters and Water Rights, S. 10, S. 36a; Illinois Cent. R. Co. vs. Illinois, 116 U.S. 387, 455, 13 S.Ct.110, 36 L.Ed.1018; Gough vs. Bell, 21 N.J.Law, 156. See, also, Greenleaf's edition of Cruise on Real Property, vol. 2, p.67, note.

'On the other hand, the power of disposition is of the very essence of the proprietary right of the state, its jus privatum. Therefore no implication against the exercise by the Legislature of the power or right to alienate and dispose of the lands and waters of the state can arise from the object and purpose for which the Constitution was ordained, except such as arises from the existence and inalienability of the jus publicum.

'From this, however, necessarily arises this limitation. The Legislature may not by the transfer, in whole or in part, of the proprietary rights of the State in its lands and waters relinquish, surrender, alienate, destroy, or substantially impair the exercise of the jus publicum. Or, to state it differently, the Legislature may not make a grant of a proprietary right in or authorize, or permit the use of, the public domain, including the tidal waters and their bottoms, except subject to the jus publicum...'

"See also Illinois Cent. R. Co. vs. Illinois, 116 U.S. 387, 13 S.Ct.110, 36 L.Ed.1018."

In this latter case, the Supreme Court states the proposition that the jus publicum cannot be relinquished just as strongly.

Q.E.D.

Leonard J. Kerpelman
Attorney for Plaintiff

I HEREBY CERTIFY that copies of the foregoing Supplementary Plaintiff's Memorandum of Law were mailed this 12th day of June, 1970, to: Leo W. Bolte, Esq., Maine St., Berlin, Md.; Robert A. Shelton, Esq., and Thomas P. Perkins, III, Esq., 1400 Mercantile Trust Bldg., Baltimore, Md.; Raymond D. Coates, Esq., 4 Broad St., Berlin, Md., 21811; Hon. Francis B. Burch, Atty. General, and Jon F. Oster, Esq., 1200 One Charles Center, Baltimore, Md., 21201; and Richard H. Pollitt, Esq., 110 N. Division St., Salisbury, Md.

M. Carter

IN THE CIRCUIT COURT FOR WORCESTER COUNTY, MARYLAND

ELINOR H. KERPELMAN	:	
	:	
Plaintiff	:	
	:	In Equity
vs.	:	
	:	Case No. 8934
HON. MARVIN MANDEL,	:	
Governor, et al	:	
	:	
Defendants	:	

ANSWER TO MEMORANDUM OF LAW OF DEFENDANT JAMES B. CAINE, INC.

The Defendant Caine seems to be under the impression that the issue in the case is whether any statute or constitutional authority can authorize a non-owner of property to give away the property which he does not own.

It is respectfully suggested that counsel has missed the point.

The entire point of the Memorandum of the Plaintiff is that the State, the Board of Public Works, the Governor, nobody, has title to the lands which is alienable. They have an inalienable title. Having an inalienable title, they cannot alienate the land. No matter what "statutory authority" they may seem to have.

Respectfully submitted,

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Leonard J. Kerpelman
Attorney for Plaintiff

I HEREBY CERTIFY that copies of the foregoing Answer to Memorandum of Law of Defendant James B. Caine, Inc., were mailed this 11th day of May, 1970, to: Lee W. Bolte, Esq., Mains Street, Berlin, Md.; Robert A. Shelton, Esq., and Thomas P. Perkins, III, Esq., 1400 Mercantile Trust Bldg., Baltimore, Md., 21202; Raymond D. Coates, Esq., 4 Broad Street, Berlin, Md., 21811; Hon. Francis B. Burch, Attorney General, and Jon F. Oster, Esq., 1200 One Charles Center, Baltimore, Md., 21201, and Richard M. Pollitt, Esq., 110 N. Division St., Salisbury, Md.

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Leonard J. Kerpelman
Attorney for Plaintiff

3. Raymond D. Coates, Esquire, 4 Broad Street, Berlin, Maryland, 21811, Attorney for Maryland Marine Properties, Inc.

4. Honorable Francis B. Burch, Attorney General, and Jon F. Oster, Esquire, 1200 One Charles Center, Baltimore, Maryland, 21201, Attorneys for the Board of Public Works.

5. Richard M. Pollitt, Esquire, Pollitt, Hughes & Bahen, 110 N. Division Street, Salisbury, Maryland, 21801, Attorney for the Board of Public Works.

BY LS
Lee W. Bolte

STATE FVM DEPT
MVA - C. DEPT
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ELINOR H. KERPELMAN,	:	IN THE
Plaintiff	:	CIRCUIT COURT
vs.	:	NO. 2
HON. MARVIN MANDEL,	:	OF
Governor, et al,	:	BALTIMORE CITY
Defendants	:	Docket: 78A
		Folio: 142
		Case #: 42686A

MEMORANDUM IN SUPPORT OF PRELIMINARY OBJECTION

The Bill of Complaint filed herein alleges essentially that the Board of Public Works (hereinafter referred to as the Board) conveyed certain lands of the State of Maryland to the other defendants for "totally inadequate and insufficient consideration." On this fundamental allegation the complainant wishes this Court to question the judgment of the Board, alleging that because complainant's judgment differs from that of the Board's, the transaction should be set aside.

This is not a complaint alleging the unconstitutionality of a statute; this is not a complaint alleging that the Board acted in violation of the Constitution, any statute or the authority granted to it--to the contrary the allegations show the Board acted pursuant to authority conferred on it. This is a complaint by a taxpayer who disagrees with the judgment of the Board, which judgment the Board was authorized by law to exercise. By the complaint, the complainant asked this court to substitute its judgment for the exercise of judgment by the Executive branch of government.

One of the defendants, James B. Caine, Inc. (Caine) contends that this court should dismiss this case as it has no jurisdiction over the subject matter.

One of the very foundations of the Maryland State government is the separation of powers. Art. 8, Decl. of Rights ("That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.") In accordance with this doctrine, the Legislature has delegated to the Executive and in particular to the Board (Art. 78A, §16 of the Maryland Code) certain powers of execution with which it is submitted, this Court should not and would not interfere, so long as the execution does not go beyond the authority delegated.

In Duvall v. Lacy, 195 Md. 138 (1950), the Court of Appeals reiterated this doctrine at 149 as follows:

"But there is no authority in the judiciary to control the members of the executive department in carrying out their duties, so long as no plain violation of the Constitution or the law is found to exist."

This is especially true when the activities of the Executive are pursuant to full discretionary authority delegated upon it. When this is the case, the questions arising from the exercise of this discretion are purely political in nature. The Court of Appeals in Maryland Committee v. Tawes, 228 Md. 412, 426 (1962) stated that political questions are "questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the Legislative or Executive branches of the government. . . . It is unquestionably true that the courts will not determine purely

political questions."

In the particular case before this Court the complainant seeks to review the full discretionary authority delegated to the Board of Public Works for the sale of certain properties of the State. The complainant does not challenge the authority granted nor does the complainant indicate that the sale was without authority. Rather the complainant wishes to attack the adequacy of consideration which is one of judgment reserved to the Board exclusively. Art. 78A, §16 provides that the Board may sell properties of the state if, in its opinion, the consideration is adequate. This is indeed a broad delegation, but again the suit does not attack the delegation (an action of which this Court might have jurisdiction over the subject matter.)

A general discussion of the doctrine of separation of powers and the restraint which the Courts exercise in reviewing activities of the Executive branch of government is fully discussed in Magruder v. Swann, 25 Md. 173 (1866). In this discussion the Court stated at 211-12:

"Where the act to be done [by the executive branch] requires judgment and discretion [as opposed to a mere ministerial duty] in the officer against whom the mandamus is prayed it will be refused.

. . . The cases cited were used to sustain the position that the Executive in his political or discretionary powers was beyond all judicial interference, not to sanction the application of the principle to the facts of each case. Although it was said in that case [reference is made to Miles v. Bradford, 22 Md. 170] that the Governor bears the same relation to the State that the President does to the United States, and in the discharge of his political duties is entitled to the same immunities, privileges and exemptions. It is nowhere said that the President

or Governor, in the discharge of mere ministerial duties would be exempt from judicial process."

In Miles v. Bradford, 22 Md. at 184, the Court of Appeals recognized that the separation of powers in Maryland was similar to the separation of powers in the federal government and applied a quote from Chief Justice Marshall in the case of Marbury v. Madison, 1 Cranch 145:

"the President is invested with certain political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience."

The Court pointed out that to make the Executive accountable to the courts would be in effect to deprive the state of a "co-ordinate, separate, distinct and independent department of government."

Needless to show by any extensive memorandum, the rule as set forth hereinabove is the same with respect to the separation of powers in the federal government. For example in Clackamas Company v. McKay, 226 F.2d 343 (1955) cert. denied, 350 U.S. 904, the Court of Appeals for the D.C. Circuit stated at 345-46:

"When the U.S. acquires, by eminent domain or otherwise, a tract of land in a State, it becomes the owner, and thereafter disposition is within the unfettered discretion of the Congress.
. . .

And of course the Courts cannot interfere with the administration of public property as arranged by the Congress and the Executive, so long as constitutional boundaries are not transgressed by either branch or statutory ones by the latter."

See also D.C. Federation of Civic Association v. Airis, 275 F. Supp. 533 (1967); Frost v. Garrison, 201 F. Supp. 389 at 391 (1962) (where the Court stated: "This Court cannot assume a wisdom superior to that of the Executive or Legislative Department with respect to the disposition of animals in Yellow-

stone National Park for the protection or benefit of such park."); Ainsworth v. Barn Ballroom Co., 157 F.2d 97 (1947); Dow v. Ickes, 123 F.2d 909 (1941), cert. denied, 315 U.S. 807, rehearing denied, 315 U.S. 830; and, Ducker v. Butler, 104 F.2d 236 (1939);

Accordingly, Caine contends that this Court has no jurisdiction over the subject matter of this action and that therefore the complaint should be dismissed.

Other Cases Under the Trust Theory.

Page

13.

Constitutional Arguments.

13.

Conclusion.

Leonard J. Kerpelman
Attorney for Plaintiff

IN THE CIRCUIT COURT FOR WORCESTER COUNTY, MARYLAND

ELINOR H. KERPELMAN	:	
	:	
Plaintiff	:	In Equity
	:	
vs.	:	Case No. 693h
	:	
HON. MARVIN MANDEL, Governor, et al	:	
	:	
Defendants	:	
	:	
	:	

I HEREBY CERTIFY that copies of the foregoing Plaintiff's Memorandum of Law were mailed this *3rd* day of May, 1970, to:

1. Lee W. Bolte, Esq., Main Street, Berlin, Maryland, attorney for James B. Caine, Inc.

2. Robert A. Shelton, Esq., and Thomas P. Perkins, III, Esq., 1400 Mercantile Trust Building, Baltimore, Maryland, 21202, attorneys for Defendant Maryland Marine Properties, Inc.

3. Raymond D. Coates, Esq., 4 Broad Street, Berlin, Maryland, 21811, attorney for Maryland Marine Properties, Inc.

4. Francis B. Burch, Esq., Attorney General, and Jon F. Oster, Esq., 1200 One Charles Center, Baltimore, Maryland, 21201, attorneys for the Board of Public Works.

5. Richard M. Pollitt, Esq., Pollitt, Hughes & Egan, 110 N. Division Street, Salisbury, Maryland, 21801, attorney for the Board of Public Works.

Leonard J. Kerpelman
Attorney for Plaintiff

PLATE GAM DEBI

RECEIVED

ELINOR H. KERPELMAN,
Plaintiff

MARVIN MANDEL, et al.,
Defendants.

IN THE
CIRCUIT COURT
NO. 2 OF
BALTIMORE CITY
78A/142/42686A

PLAINTIFF'S MEMORANDUM
OF LAW

General. "Navigable".
High Water Mark.
Historical.

9-15-64

(14)

Maryland's ownership of its submerged lands under navigable waters derives from the English Common Law. Prior to the American Revolution, the Crown held all of the tidelands and beds of the navigable waters. After the American Revolution, title to these lands passed to the thirteen original states.

"Navigable" is an expansive term in Maryland. It has been held in the cases to include every part of stream or body of water, entire, from bank to bank, wherever the tide ebbs and flows. Wagner v. Mayor & City Council, 210 Md. 615. It includes water navigable by a flat-bottomed rowboat.

Maryland also takes an encompassing view of the question of whether the state's title runs to the tidal mean low water mark, or to the tidal mean high water mark - and Maryland has, along with many other states, opted for the latter, the high water mark. Day v. Day, 22 Md. 520 (1865); Patterson v. Galston, 23 Md. 432 (1865); Cahill v. Mayor & City Council of Baltimore, 173 Md. 450 (1938).

Historical.

By a devious course of historic derivation, the owners of riparian land - shore land - seem to have some probably minor vested rights in the submerged lands before their properties. This they have very recently sought to expand into an unrestricted ownership which they apparently would like to contend stops only at the middle of the stream and includes, according to this new contention, the right to fill in to any extent desired, so as to make dry land where there was before navigable water. This, of course, has created the current wetlands dispute.

This odd contention is based on the fact that in Maryland, as in other states, there was a development in the last century and beyond of the right

to "wharf out" or otherwise acquire meaningful access to the deep part of the stream upon which land faced. This right has always, historically, had as its main purpose, the enhancement of that unique valuable feature of shoreland, access to the whole wide world by means of waterways navigation.

Also, there has developed (unfortunately, as far as conservationists are concerned) another exception in Maryland - legislatively - of allowing certain filling for commercial and, even according to a 1914 Court of Appeals view, "agricultural" purposes. This legislative exception, however, has never really been fully analyzed by a Court, particularly under the presently contended for circumstances, and this apparently is what has given bold hope to the developer defendants, and torn-out hanks of hair to citizens worried about the future of Chesapeake Bay.

II.

Statutes. The kind of title the State holds

Article 54, Section 46, of the Maryland Code (passed in 1745), provides that improvements such as wharfs and docks shall pass with the land when sold. This was a matter which was unclear before passage of this section and shows that the legislature recognized that the shore owner did not own an alienable interest in submerged land in front of his property.

Article 54, Section 48, provides ... "No patent shall hereafter issue for land covered by navigable waters."

The purpose of the latter section was to prevent the state from selling out from under an improver, as had sometimes occurred, those wharfs or other structures which may have been constructed over the bed of the stream, in furtherance of the shore owner's right to reach deep water over submerged land which he did not own a fee interest in.

Shively v. Bowlby

The occurrence of such statutes as these was not peculiar to Maryland, as may be expected. As was said in the leading case of Shively v. Bowlby, U.S., by the Supreme Court in 1893:

"The governments of the several colonies, with a view to induce persons to erect wharves for the benefit of navigation and commerce, early allowed the owners of lands bounding on tidewaters greater rights and privileges in the shore below high water mark than they had in England. But the nature and degree of such rights and privileges differed in the different colonies, and in some were created by statute, while in others they rested upon usage only."

The Court then reviewed the situation in all the original states and said:

"In Maryland, the owner of land bounded by tidewater is authorized, according to various statutes beginning in 1745, to build wharves or other improvements upon the flats in front of his land and to acquire a right in the land so improved. Casey v. Inloes, 1 Gill 430..."

Agriculture

The unfortunate "agricultural" language referred to before appears in Hess v. Muir, 65 Md. 586 (1886), and in Hudson v. Nelson, 122 Md. 330 (1914):

"Farming and commercial interests are promoted by the privilege (of extending improvements into the water), and to encourage the development of these was the main object of conferring it."

These great boons and improvements of the 1886 and 1914 cases cause environmentalists to shudder today. Land, for farming, particularly in small plots, is not at such a premium as it once was. The greater premium now, without question, is on wetlands for their food-producing and environment-protecting functions. Time was when people were lazily unconcerned about such matters. But today, it is an aware public which breathlessly watches Liza crossing the ice and hopes that Simon Legree is not called Maryland Court of Appeals. At any rate, in Hess v. Muir and Hudson v. Nelson, the question at issue was not really the filling in of large tracts, and using the shoreland as an excuse to do things which are usually done on dry land. The Court was talking about matters which, in fact, were not before it and was, therefore, rather obviously delivering an "obiter dictum".

It is hoped that what will be convincing will be the language in the old and leading cases, such as Shively v. Bowlby, quoted above. In that case, Mr. Justice Gray, speaking for the United States Supreme Court, described the ownership which was vested in the King, of yore, by virtue of his sovereignty, and which passed to the states and/or the United States in 1783 upon the adoption of the federal constitution. The Court said, using language colorful, quaint, broad, convincing, and libertarian, not to say biologically sound:

"By the Common Law, both the title and the dominion of the sea, and the rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their natures, for highways of navigation and commerce, domestic and foreign, and

for the purpose of fishing by all the King's subjects. Therefore, the title, jus privatem, in such lands, as of waste or unoccupied lands, belongs to the King as the sovereign; and the dominion thereof, jus publicam, is vested in him as the representative of the nation and for the public benefit.

... "But though the King is the owner of this great waste, and as a consequence of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof, yet the Common People of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places, creeks or navigable rivers, where either the King or some particular subject hath gained a propriety exclusive of that common liberty. (Quoting here Lord Hale in an ancient English document): ... 'Yet, the people have a public interest, a jus publicam, of passage and re-passage with their goods by water, and must not be obstructed by nuisances for the jus privatem of the owner or proprietor, who is charged with and subject to that jus publicam which belongs to the King's subjects; as the soil of a highway is, which, we know in point of property, it may be a private man's freehold, yet it is charged with the public interest of the people, which may not be prejudiced or demnified.'

"By recent judgments of the House of Lords...it has been established in England that the owner of land fronting on a navigable river in which the tide ebbs and flows has a right of access from his land to the river. ...The right thus recognized, however, is not a title in the soil below high water mark, nor a right to build thereon, but a right of access only, analagous to that of an abutter on a highway."

Justice Gray then went on to say that the above Common Law of England had been "at the time of the immigration of our ancestors, so - and is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several colonies and states, or by the Constitution and Laws of the United States. Justice Gray said further, quoting a former Opinion by Chief Justice Taney:

"The country mentioned (meaning submerged lands) was held by the King as the representative of the nation and in trust for them. In his hands they were intended to be in trust for the common use of the new community about to be established, a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shellfish as floating fish, and not as private property, to be parceled out and sold, ...and in the judgment of the Court, the lands under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; and were to be held by him in the same manner and for the same purposes that the navigable waters of England, and the soils under them, are held by the Crown." (Taney was here referring to a grant which later became New Jersey.) "When the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights, since surrendered by the Constitution, to the general government." (Eph. supp.)

Mr. Justice Gray went on to further speak of an earlier Supreme Court case, Smith v. Maryland, 59 U.S. 18, in which Mr. Justice Curtis, in affirming the

right of the State of Maryland to protect the oyster fishery within its boundaries", said:

"Whatever soil...is the subject of exclusive propriety and ownership belongs to the state on whose maritime border and within whose territory it lies. ...But this soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shellfish as floating fish...." Smith v. Maryland, 59 U.S. 18.

Likewise, the great Declaration of Rights of Maryland provides in Article 6, that "Legislative and Executive officers are trustees of the public."

III.

Comments

Fortunately, privileges specially granted by the state are traditionally subject to strict construction against the grantee. Bostick v. Smoot Sand & Gravel Corp., 154 F.Supp. 744 (D.Md. 1957).

No Maryland court has had presented to it directly, however, the question of the extent to which a shoreside owner may improve property out over the water, or into the water, by bulkheading and filling or, for example, by building a whole housing development down at Assawoman Bay. Logic would seem to dictate that the provisions of Section 46 of Article 54 were not meant to provide for housing developments.

Also causing an abundance of difficulty is Section 15 of Article 78A, which places unfettered (except as all statutes are fettered by the constitutions of the state and of the United States), and boundless discretion in the Board of Public Works, by providing:

"Any real or personal property in the State of Maryland...and any legal or equitable rights, interests, privileges, or easements in, to, or over the same, may be sold, leased, transferred, exchanged, granted or otherwise disposed of to any person, firm (or) corporation...for a consideration adequate in the opinion of the Board of Public Works...(This) shall include the inland waters of the state and land under said waters..."

Well possibly, if the state had good title to give in the first place. Shively v. Bowlby shows it did not, however. Besides, is not the seemingly limitless power of the Board of Public Works, not only limited constitutionally, but also limited by Section 48 of Article 54, providing that "no patent...shall hereafter issue for land covered by navigable waters", which section was last re-enacted in 1955, in the same form in which it was first enacted in 1862? And

what about Article 6 of the Declaration of Rights which provides that the executive officers of a state are trustees of the people? Can a trustee give away trust property?

Finally, and yet a point of almost pristine novelty in the law: What about the rights of the public to the continuation of a viable environment? This latter, many believe, is the most important question undecided. It is not only undecided in Maryland, it is undecided in the federal court system, and it is undecided by the Supreme Court. It seems conservatively prudent to believe that what with a public and courts newly aware of the dangers to the environment which are imposed by modern-day population pressure, industrial expansion, land gobbling of various kinds, and in this case by water gobbling, that the Court will be sympathetic to new arguments categorizing these public interests as being encompassed already in the familiar "life, liberty and property" so long protected from encroachment by the states, as well as by Congress by virtue of the 14th Amendment.

In short, it seems that the time is propitious for the court to declare itself in favor of living and breathing, and in favor of a little peace and recreation besides.


Leonard J. Kerpelman
Attorney for Plaintiff

Specificity of Real Property
and the Obligations Upon the
Trustee.

An owner's right to his specific real property has long been recognized in the law. The remedy of "specific performance" grew out of the recognition of the uniqueness of land. Why should subaqueous land, held in trust by the state for the benefit of all the people, be subject to any lesser standard of protection? Indeed, a fiduciary is bound to an even greater effort at protection and the public's right to the ownership of its submerged realty cannot be alienated by the state. The state in its function as trustee may not weigh and balance the benefits between the whole public and riparian neighbors or anyone else. Such a test would be a breach of trust. The trustee may only consider: "What use of this property will best benefit the beneficiaries within the limits of the purpose of the trust?" This is classic trust law, and any failure to apply it, no matter how "minor", is another breach by which the public has been cheated.

"Insubstantiality" of the acreage
under consideration.

In the mistaken rationalization that many of these land transfers are "insubstantial", great irreparable harm has occurred to the very property rights sought here to be protected. The Department of the Interior, for example, has since 1965, received more than 20,640 applications for dredge and fill operations.* This number provides a clue to the magnitude of destruction suffered by the nation's irreplaceable and non-renewable estuarine resources.

Statistics.

It has been disclosed* that because of the cumulative effect of generally small dredge and fill operations, the United States has now lost over 7% of its total estuarine areas, about 750,000 acres, as important fish and wildlife habitats: the East Coast, including Florida - 165,000 acres; the Gulf Coast, excluding Florida - 71,000 acres; the West Coast - 261,000 acres with the State of California alone suffering a 67% loss of vital estuaries!

Scientific data indicates that without the estuary, the aquatic environments would be reduced to lifeless biological deserts. A symposium on Estuarine Fisheries, American Fisheries Society, September 1964.

By small stages, and by miniscule applications, for "unimportant" filling, 160 square miles of the shoal water area of San Francisco Bay has been filled in - 35% of the irreplaceable productive area of that Bay.¹

The social and economic problems inherent in the development of an estuarine bay was described by Roland F. Smith, Chairman of the Estuarine Fisheries Committee of the American Fisheries Society at its 94th annual meeting. "Concern for our estuarine fishery resources", he stated, "is more than a sentimental attempt to preserve a part of our natural heritage doomed by the materialistic demands of a rapidly expanding and affluent population. At least 64% of our nation's commercial fish and shellfish and most marine sports species inhabit the estuarine environment during all or part of their life cycle. Most of these represent top-quality food species or highly-prized sport fish... The contribution of these estuarine fishery resources to our general health and economic well-being has increased at a far greater rate than was predicted 20, 10, even 5 years ago. Current estimates of future use and demands may prove to be equally conservative. The fact remains that for most estuarine fishery resources our major problem will be to provide an adequate supply in the face of increased demands and dwindling habitat."²

* Congressional hearings on "Permit for landfill in Hunting Creek, Virginia"; Committee on Government Operations, 1966.

¹ Estuaries and Their Natural Resources, Hearing Before the Committee on Commerce, 90th Congress, 2nd Session.

² Ibid.

An unreasonable burden has fallen on the public in protecting their property rights in the environmental benefits and necessities which are so continuously threatened by industry, and economically powerful forces in the economy, or equally powerfully situated as to lobbying in legislatures, and who cannot be defeated by the ordinary citizen without very direct assistance accorded to him in his courts.

The direction which this assistance might take, is exemplified in Berman v. Parker, 348 U.S. 26, 99 L.Ed. 27, an urban renewal case, in which Justice Douglas speaking for a unanimous court, and discussing the right of a state to clear slums, said:

"An attempt to define the reach (of the police power) or trace its outer limits is fruitless...Public safety, public health, morality, peace and quiet, law and order, - these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."

While the court was speaking of the police power, the same can be said, if a court will have the willingness to say it, concerning the beleaguered and vital rights which the citizen has to the uninterrupted enjoyment of a healthful, pleasureable, productive, economically viable environment.

In the Berman case, the court also stated, at page 33:

"We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary."

More Shively v. Bowlby

"Some passages in the Opinions in certain cases relied on by the learned counsel for the Plaintiff in error, are cited as showing that the owner of land adjoining any navigable water, whether within or above the ebb and flow of the tide has, independently of local law, the right of property in the soil below high water mark, and the right to build out wharfs so far at least as to reach water really navigable.

"But the remarks of Mr. Justice Clifford in the first of those cases, upon which his own remarks in the second case, and those of Mr. Justice Miller in the third case were based, distinctly recognized the diversity of laws and usages in the different states upon this subject, and went no further than to say that wharves, piers and landing places, 'where they conform to the regulations of the state', and do not extend below low water mark, have never been held to be nuisances, unless they obstruct the paramount right of navigation; that the right of the riparian owner to erect such structures in the navigable waters of the Atlantic states has been claimed, exercised and sanctioned from the first settlement of the country to the present time; that 'different states adopted different regulations upon the subject, and in some, the right of the riparian proprietor rests upon immemorial local usage'; and that 'no reason is perceived why the same general principle should not be applicable to the lakes, so far as to permit the owner of the adjacent land to build out as far as where the water first becomes deep enough to become navigable'. 66 U.S. 31, 32. And none of the three cases called for the laying down or defining of any rule independent of local law or usage, or of the particular facts before the court.

"IX. But Congress has never undertaken by general laws to dispose of such lands, and the reasons are not far to seek.

As has been seen, by the law of England, the title in fee, or jus privatum, of the King or his grantee was, in the phrase of Lord Hale, 'charged with and subject to that jus publicum which belongs to the King's subjects' or, as he elsewhere puts it, 'is clothed and superinduced with a jus publicum, wherein both natives and foreigners in peace with this kingdom are interested by reason of common commerce, trade and intercourse.' Hargreave's Law Tracts, 36, 34. In the words of Chief Justice Taney, 'The country discovered and settled by Englishmen was held by the King in his public and regal character as the representative of the nation, and in trust for them; and the title and dominion of the tide-waters and of the soil under them, in each colony, passed by the Royal Charter to the grantees, as 'a trust for the common use of the new community about to be established; and, upon the American Revolution, vested absolutely in the people of each state 'for their own common use, subject only to the rights since surrendered by the Constitution to the general government.' Martin v. Waddell, 41 U.S. 16 PET. 367, 409 to 411. As observed by Mr. Justice Curtis, 'this soil is held by the state not only subject to, but in some sense in trust for, the enjoyment of certain public rights'. Smith v. Maryland, 59 U.S. 18, HOW 71, 74. The title to the shore and lands under the water, said Mr. Justice Bradley, 'is regarded as incidental to the sovereignty of the state - a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery'. Hardin v. Jordan, 140 U.S. 371, 381.

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands...may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, be chiefly valuable for the public purposes of commerce, navigation, and fishery, and for the improvements necessary to secure and promote these purposes, they shall not be granted away during the period of territorial government; but...shall be held by the United States in trust for the future states and shall vest in the several states, when organized...with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, they shall not be disposed of piecemeal to individuals as private property but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state after it shall have become a completely organized community." (Emph. supp.)

And, at page 58:

"The conclusions from the considerations and authorities above may be summed up as follows:

"Lands under tidewaters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title and the control of them are vested in the sovereign for the benefit of the whole people.

"At common law, the title and the dominion in lands flowed by the tide, were in the Kings, for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the Royal Charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states, within their respective borders, subject to the rights surrendered by the Constitution of

the United States.

"Upon the acquisition of a territory by the United States, whether by cession from one of the states or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory."

Another Leading Case

The trust principle was recognized by the United States Supreme Court again, in the landmark case of Illinois Central Railroad Company v. Illinois, 146 U.S. 1018 (1892), and has been cited again and again in dozens of cases, perhaps even more than a hundred. The Court said, at page 1042:

"That the state holds the title to the lands under the navigable waters...in the same manner that the state holds title to soils under tidewater by the common law, as we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty to fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in the commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the state may grant parcels of the submerged land; and so long as disposition is made for such purposes, no valid objections can be made to the grants. It is grants of parcels of land under navigable waters that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and water remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust of the public upon which such lands are held by the state." (Emphasis supp.).

The Court went on to say that general language in some of the previous cases was expressive of absolute ownership by the state of the lands under navigable waters, "irrespective of any trust as to their use and disposition, (but these cases) must be read and construed with reference to the special facts of the particular cases." *Ib.* at 1043.

The Better Cases - The Trust Theory.

This is so. However, the better reasoned cases discuss the trust theory at length and recognize that when the Constitution of the United States became operative, the several states continued to hold title to beds of all waters within their borders which were navigable, not for disposition to individual ownership, but in trust. See Shively v. Bowlby, 152 U.S. 11, *supra.*, Brickell v. Trammell, 82 S.221 (Fla. 1919); Apalachicola Land & Development Co. v. McRee, 98 S.505 (Fla. 1923).

In Brickell, *supra.*, at page 226, the Court said, for example:

"The trust in which the title to the lands under navigable waters is held is governmental in nature and cannot be wholly alienated by the states. For the purpose of enhancing the rights and interests of the whole people, the states may by appropriate means grant to individuals limited privileges in the lands under navigable waters, but not so as to divert them or the waters thereon from their proper

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p.

use for the public welfare, or so as to relieve the states respectively of the control and regulation of the uses afforded by the land and the waters, or so as to interfere with the lawful authority of Congress. (Emph. supp.)

... "The rights of the people of the states in the navigable waters and the lands thereunder, including the shore or space between ordinary high and low water marks, relate to navigation, commerce, fishing, bathing, and other easements allowed by law."

In *in re Waterfront on North River and City of New York*, 205 N.Y. Supp. 56, the Court said:

"Lands under navigable waters are owned by the state or city in trust for the public, and no diversion of ownership or use is permissible, except in aid of commerce, navigation, or for public purpose."

An interesting case is *State v. Cleveland P R Company*, 113 N.E. 677, in which at page 681, the Court said:

"As shown, the state holds the title to the subaqueous land as trustee for the protection of public rights. ... (T)he littoral owner for the purposes of navigation, should be held to have the right to wharf out to the line of navigability as fixed by the general government, provided he does not interfere with public rights. Otherwise, through the mere absence of legislation by the state, the supreme utility and value of navigable waters - navigation and commerce - would be defeated. Whatever (the littoral owner) does in that behalf is done with knowledge on his part that the title to the subaqueous soil is held by the state as trustee for the public, and that nothing can be done by him that will destroy or weaken the rights of the beneficiaries of the trust estate. ..."

This case points out starkly, the proper view and purpose of regulations giving littoral owners the right to make improvements out to the "wharf line" or "bulkhead line", which is spoken of with great abandon in many Maryland cases, when the Court was not under any pressure to consider that in the future its words might be considered to mean that a riparian (or littoral) owner might be claimed to have the right to destroy a part of the body of water and deprive the public of its utility. In all of those Maryland cases, the littoral owner was enhancing the utility of the public waters, and not interfering with the trusteeship ownership which the state held, but was making the land more available for navigational access and commerce. The cavalier Maryland dicta speaking of agricultural uses, however, cannot be reconciled with this trust theory, and this must be so recognized by any realistic person facing the facts which the Maryland court will be asked to face. If the Maryland court wishes to slither out, supposedly it may do so by falling back on the "agricultural" language, but it certainly could not do so in very good conscience it would seem. Dicta, as is well recognized in the law, is not binding and merely amounts to a suggestion of extension of the law, and this principle in question grew up from the well-recognized proposition that when a court is not required to decide a matter under the pressing urgency of present circumstances, as elicited in the facts in the case before it, it could well get into treacherous ground and be tripped up by later facts in which the application of a general principle enunciated as dictum did not fit at all, and did not work justice - but injustice. Hence, the harsh reluctance of courts to be bound by statements in earlier cases which were not necessary to the decision in the cases - or dicta. So here.

Likewise, Section 45 of Article 5, providing:

"The proprietor of land bounding on...navigable waters...shall be entitled to all accretions to said land...whether...formed... by natural causes or otherwise, in like manner and to like extent

as such right may or can be claimed by the proprietor of land bounding on water not navigable."

Such statutory language can conceivably be interpreted, can readily be claimed to give, the right to build up ocean front property, for example, all the way from Ocean City out to within sight of Liverpool. But on the basis of the kind of title which Maryland has in submerged lands under navigable waters, it should be clear, it seems, that the Legislature could not give away that which it, or the state, did not own. It cannot give away a fee title as it did not own a fee title. According to Shively v. Bowlby, supra., and the reasoning therein, many times followed, neither the King in olden time could give away lands which were jus publicum, nor could the state, which as shown in Shively v. Bowlby, held the same kind of title, give away a fee interest. It could not give away an unfettered, unbounded interest of ownership of lands under navigable waters.

Should Maryland decide otherwise, it would be among a small minority of states which have, in a small minority of cases, mistakenly relying on dictum and misinterpretation, acted contrary to what is clearly becoming an extremely important public interest in our modern, crowded, polluted world.

An "Opinion" (so-called)
of the Attorney General.

Besides, there is certainly a contrary argument, embodied in an examination of the noun "accretion" in the above Article 54, Sec. 45. "Accretion" is 'a word of art' in the law of waters, which properly describes the gradual, natural, process of the deposit of sediment along the shore, thereby building "fastland". Black's Law Dictionary, pages 36, 37; 1A Words and Phrases 422 (1964). The statutory phrase "accretions to said land by the recession of said water" is, in fact, an incorrect use of the noun "accretion", for the exposure of land by gradual subsidence of water is properly called "dereliction" (sometimes shortened to "reliction"), a phenomenon different from accretion although generally having the same legal consequences. In any event, it seems well settled that accretion is a gradual process which, although sometimes expanded to include improvements, or fill, put in front of a riparian owner's property by the acts of third persons, cannot without gross distortion define the deliberate action of a riparian owner dumping fill overboard until the bottom in front of his property emerges as fastland.¹

In the Opinion of the Attorney General found at page 452 of Volume 50 of Attorney General's Opinions (1965) says, at page 461:

"Nor is (accretion) a right, as we see it, to thrust one's acreage into open water. This conclusion takes full account of the statutory phrase (Section 45, Article 74) "formed or made by natural causes or otherwise...".

But unfortunately, what the Attorney General had done was to think wishfully, as Attorney Generals are wont to do, when they know the boss wants a certain conclusion.

In actual fact, however, the "Opinion" is not specifically, nor directly, substantiated by cases in Maryland interpreting the unique beneficence of the Maryland Statute to private entrepreneurs.

Better thinking seems to be along the line of relying on the fact that neither the King nor the State of Maryland could give away that which it held only in trust, or following another line of reasoning, that the Statute was meant to affirm good title in expensive wharves which riparian owners were being encouraged to construct, for before the statute, they could not have been sure that in building out over state waters, the state would not assert

1. Pirated from Mr. Redden's "Attorney General's Opinion." Thanks, Roger.
Vol. 50, p. 459.

its own (the people's) rights, or give rights in the stream or in the bed of the stream to others, defeating the riparian's capital expenditure.

Or, again, that the Legislature cannot give away the right of control over navigable waters which had been granted to the United States by Maryland's ratification of the federal constitution.

Other Cases Under the Trust Theory.

"The state has the power to permit a railroad company to build and operate a railroad over tide and submerged lands to a connection with deep water navigation, as such a disposition of the public land held in trust for purposes of navigation and commerce would be in furtherance of the trust and valid." Koyer v. Minor, 156 P. 1023.

"Tideland may be devoted to any use not inconsistent with the public trust; neither the construction of piers, groins, and breakwaters improving the harbor, nor improvements by way of a public park to develop the beach area, are violative of the public trust subject to which the state holds the land." People v. Hecker, 4 Cal. Repr. 334 (Cal. 1963).

"The doctrine that the state holds beds under navigable waters in trust, prevents the state from making a substantial grant of lake beds for purely private purposes; even for a public purpose the state cannot change an entire lake into dry land or alter it so as to destroy its character as a lake; the doctrine does not prevent minor alterations of natural boundaries between water and land." State v. Public Service Commission, 81 NW 2d, 71 (Wisc. 1965).

Lands covered by navigable waters cannot be granted.

Swan Island Club, Inc. v. White, DCNC 114 F.Supp. 95. Affirmed OCA 4, Swan Island Club, Inc. v. Yarbrough, 209 F2d 698 (1954). This case is a modern reappraisal and affirmance of a trust doctrine in this circuit.

65 CJS, Navigable Waters, Section 99(3), page 313 et seq.:

"The power of the state to dispose of lands under navigable water is limited by the public trust in which such lands are held, and the state's power of alienation is subject to the paramount rights of the public, including the right of navigation. The state cannot by grant...abdicate, surrender or delegate its trusteeship... or surrender entirely its control over navigable waters. Citing many cases.

Constitutional Arguments.

The Plaintiff further argues that the state, by the attempted sale of part of the Bay waters, with knowledge of the Defendant Developers' intention to drain or fill the land under these waters and erect trailer park developments, not in aid of navigation, has denied to the Plaintiff and the class she represents, public rights, privileges and immunities protected by the 5th, 9th and 14th Amendments of the Constitution of the United States.

And the 10th,

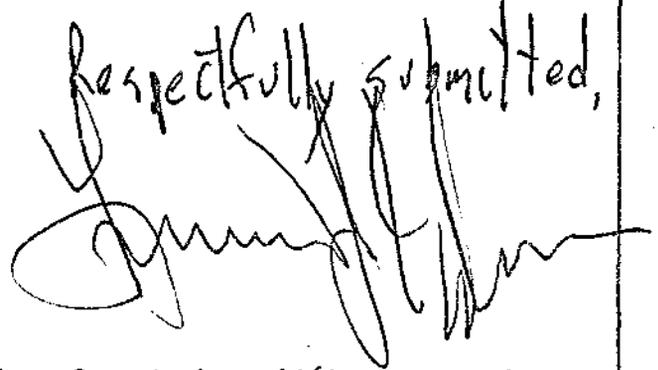
"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

"The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the states or to the people." U.S. v. Sprague, 282 U.S. 716, 733 (1931).

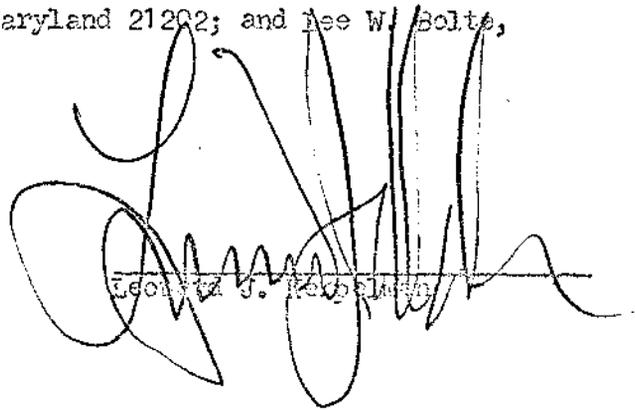
It is the contention of the Plaintiff in the suit that the property which was here turned over to private developers was not owned by the state in a capacity in which it could have disposed of it for such purposes.

Conclusion.

It certainly seems reasonable to assume that the property of all - the air, the water, fisheries, recreationally valuable areas - will have to be protected in the name of all, if all are not to be doomed bit by bit. Historically, legislatures and congresses have been unresponsive to this need, and have come in on the side of the public only with great reluctance. The courts, which have protected voting rights, civil rights, property rights, and personal rights of individuals against rapacious governmental and private tyrannies of various sorts would seem, in our system, to be the primary bulwark to be depended on, particularly a court of Equity.

Respectfully submitted,


I HEREBY CERTIFY that on this 12th day of September, 1969, a copy of the foregoing was mailed to Francis B. Burch, Esq., Attorney General, One Charles Center, Baltimore, Maryland 21201; Thomas Perkins, Esq., 1400 Mercantile Trust Building, Baltimore, Maryland 21202; and Lee W. Bolte, Esq., Berlin, Maryland 21811.


 Leonard J. Kelly

Mr. Galt

Filed May 11, 1970

ELINOR H. KERPELMAH	:	IN THE
Plaintiff	:	CIRCUIT COURT
vs.	:	FOR
MARVIN MANDEL, et al	:	WORCESTER COUNTY
Defendants	:	Equity No. 8934

MOTION FOR SUMMARY JUDGMENT UPON SOME ISSUES

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Now comes Elinor H. Kerpelman, Plaintiff, by Leonard J. Kerpelman, her Attorney, and says:

That there is no dispute as to any material fact concerning the following issues in the above-entitled case:

- a. That she is a taxpayer of the State of Maryland.
- b. That she is a resident thereof in Baltimore City.
- c. That this suit is brought on her own behalf, and on behalf of all others similarly situated.

WHEREFORE, the Plaintiff prays that Summary Judgment be granted in her favor upon the above matters.

 Leonard J. Kerpelman
 Attorney for Plaintiff

AFFIDAVIT

CITY OF BALTIMORE,
STATE OF MARYLAND, to wit:

Before me, the subscriber, a Notary Public, in and for the City and State aforesaid, personally appeared ELINOR H. KERPELMAH, this day of April, 1970, and made oath in due form of law as follows:

- 1. That she owns property in Baltimore City, namely, 2403 West Rogers Avenue, as tenant by the entirety, with her husband, and pays taxes thereon, for which she is jointly and severally liable to the State of

Maryland, and to Baltimore City, under the heading of "Real Estate Tax"; she also is employed by the Mayor and City Council of Baltimore City as a school teacher, and pays Federal and State of Maryland income taxes on her income so earned. She also pays sales taxes frequently.

2. She has resided in Baltimore City for all of her life, and brought this suit of her own free will, in order to redress the wrongs complained of therein, both on her own behalf and at her initiative, on behalf of all others similarly situated.

WHEREFORE, I have hereunto set my hand and seal, this day of April, 1970.

Notary Public

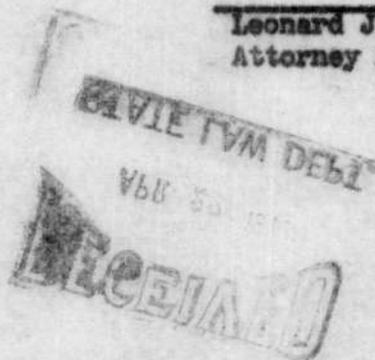
I HEREBY CERTIFY certify that copies of the foregoing Motion For Summary Judgment Upon Some Issues were mailed this day of April, 1970, to Francis Burch, Esq., One Charles Center, Baltimore, Md., 21202, Thomas P. Perkins, III, Esq., 1400 Mercantile Trust Bldg., Baltimore, Md., 21202, Raymond D. Coates, 4 Broad Street, Berlin, Md., 21811, Richard M. Pellitt, Esq., 110 N. Division St., Salisbury, Md., and Lee W. Bolte, Esq., Main St., Berlin, Md., 21811.

Leonard J. Kerpelman
Attorney for Plaintiff

Counsel:

The above Motion for Summary Judgment will be executed and filed promptly, within approximately three days.

Leonard J. Kerpelman
Attorney for Plaintiff



THIS IS TO CERTIFY, that on this 9th day of March,
1970, a carbon copy of the foregoing was mailed, via regular U.S.
mail, postage prepaid, to the following:

Robert A. Shelton, Esquire
Thomas P. Perkins, III, Esquire
1400 Mercantile Trust Building
Baltimore, Maryland 21202
Attorneys for Defendant,
Maryland Marine Properties, Inc.

Raymond D. Coates, Esquire
4 Broad Street
Berlin, Maryland 21811
Attorney for Maryland Marine Properties, Inc.

Honorable Francis B. Burch
Attorney General of Maryland
and
Jon F. Oster, Esquire
Suite 1200 - One Charles Center
Baltimore, Maryland 21201
Attorneys for Board of Public Works

Richard M. Pollitt, Esquire
Pollitt, Hughes & Bahen
110 N. Division Street
Salisbury, Maryland 21801
Attorney for Board of Public Works

LEONARD J. KERPELMAN
Attorney for Complainant
1101 N. Calvert Street
Baltimore, Maryland 21202
SA. 7-7800

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M. Cate

IN THE CIRCUIT COURT FOR WORCESTER COUNTY, MARYLAND

ELINOR H. KERPELMAN,	:	
	:	
Complainant	:	In Equity
	:	
vs.	:	
	:	Cause No. 8934
HON. MARVIN MANDEL	:	
Governor, et al.	:	
	:	
Defendants	:	

MOTION NE RECIPIATUR AS TO PETITION TO INTERVENE AS PLAINTIFFS

James B. Caine, Inc., by Sanford and Bolte, its Solicitors, prays that the Petition of North American Habitat Preservation Society and R. Doyle Grabarck to intervene as Plaintiffs be not received, and for cause of said Motion says:

A copy of the aforesaid Petition was not served upon the undersigned as Attorneys for James B. Caine, Inc., and the Clerk of this Honorable Court ought not to have accepted the same. See Rule 306, subparagraph a. 2.

A copy of the same was purportedly sent to a certain Joseph H. Young, Esquire, 901 First National Bank Building, Baltimore, Maryland, as "Attorney for James B. Caine, Inc." Mr. Young does not represent James B. Caine, Inc. in this case, nor has his appearance ever been entered in this particular case.

The existence of the aforesaid Petition to Intervene was accidentally discovered by the undersigned on Tuesday, February 24, 1970, while perusing the original papers in this suit.

SANFORD AND BOLTE

By LB
Lee W. Bolte
Main Street
Berlin, Maryland 21811
641-0700; 0701

I HEREBY CERTIFY that on this 26th day of February, 1970, an exact duplicate copy of the foregoing was mailed, by regular United States mail, postage prepaid, to the following:

1. Leonard J. Kerpelman, Esquire, Attorney for the Plaintiffs and the North American Habitat Preservation Society and R. Doyle Grabarck, Petitioners, 500 Equitable Building, Baltimore, Maryland 21202.
2. Robert A. Shelton, Esquire, and Thomas P. Perkins, III, Esquire, 1400 Mercantile Trust Building, Baltimore, Maryland, 21202, Attorneys for Defendant Maryland Marine Properties, Inc.
3. Raymond D. Coates, Esquire, 4 Broad Street, Berlin, Maryland, 21811, Attorney for Maryland Marine Properties, Inc.
4. Honorable Francis B. Burch, Attorney General, and Jon F. Oster, Esquire, 1200 One Charles Center, Baltimore, Maryland, 21201, Attorneys for the Board of Public Works. ✓
5. Richard M. Pollitt, Esquire, Pollitt, Hughes & Bahen, 110 N. Division Street, Salisbury, Maryland, 21801, Attorney for the Board of Public Works.

SANFORD AND BOLTE

by LS
Lee W. Bolte

21216 GAM DEBI
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IN THE CIRCUIT COURT FOR WORCESTER COUNTY, MARYLAND

ELINOR H. KERPELMAN,
Complainant

-vs-

HONORABLE MARVIN MANDEL,
Governor, et al.

*
*
*
*
*
*

In Equity

Cause No. 8934

MOTION NE RECIPIATUR

Now comes ELINOR H. KERPELMAN, Complainant, by Leonard J. Kerpelman, her solicitor, and says:

1. That heretofore, on February 26, 1970, James B. Caine, Inc., one of the Plaintiffs or Defendants in the above entitled case, filed a "Motion Ne Recipiatur" as to the Petition to Intervene as Plaintiffs."

2. That said Motion alleged facts not apparent from the face of the record, and yet was not under affidavit, as is required by the Maryland Rules.

WHEREFORE, the Complainant prays that the said Motion hereinabove referred to, be not received.

LEONARD J. KERPELMAN
Attorney for Complainant
1101 N. Calvert Street
Baltimore, Maryland 21202
SA.7-7800

MEMORANDUM OF RULES IN AUTHORITY

Maryland Rules - Pleading.

LEONARD J. KERPELMAN
Attorney for Complainant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Answer to Petition to Intervene was mailed by me, postage prepaid, on this twenty-fourth day of February, 1970, to Leonard J. Kerpelman, Esquire, 500 Equitable Building, Baltimore, Maryland 21202, Attorney for Plaintiff Elinor H. Kerpelman; to Lee W. Bolte, Esquire, 103 N. Main Street, Berlin, Maryland 21811, Attorney for Defendant James B. Caine, Inc.; and to Fred Oken, Esquire, Office of Attorney General, 1200 One Charles Center, Baltimore, Maryland 21201.

/s/ Robert A. Shelton

Robert A. Shelton

ELINOR H. KERPELMAN,
Complainant
v.
MARVIN MANDEL, et al.,
Defendants

IN THE
CIRCUIT COURT FOR
WORCESTER COUNTY
-Equity No. 8934

• • • • •
PETITION TO
INTERVENE AS PLAINTIFFS

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Now comes the North American Habitat Preservation Society, and R. Doyle Grabarek, its President, suing however, Individually, by Leonard J. Kerpelman, their Solicitor, and respectfully represent:

1. The petitioning organization is a corporation of the Commonwealth of Pennsylvania, organized under the non-profit laws of that state on March 24, 1969; Petitioner Grabarek is a Maryland resident, and a member of said Society; the address of each is Box 869, Adelphi, Maryland 20783.
2. The said Society has a Maryland membership of Maryland residents and citizens, of 4,335 active members, each of whom is personally dedicated to the purposes and goals of the said Society. The great majority, over 60%, of said members are young people under the age of 30, but from all walks of life; working people, professional people, students and academicians; and every race, color, creed, economic circumstance and social outlook, it may fairly be said, are comprised among its membership.
3. The goals of the organization, and its purposes, substantially as set forth in its Charter, are the following:
 - A. To financially support meaningful, creative litigation, the purpose of which is to preserve the nation's natural resource and environmental heritage.
 - B. To conduct scientific research on pollutants of air and water, and to develop methods by which the waste disposal problem of cities and suburbs might be made economically useful instead of an economic drain.

- C. To work in conjunction with government, private business, and institutions to set up scientific advisory boards which can offer independent advice to these agencies, and to conduct unbiased research for industry and government, the results of which would condone, condemn, or offer alternatives to their own plans.
- D. To act as a public educator in developing environmental science units for schools, and in developing awareness programs for all citizens.
4. Many members of the said Society, at least 2,800, are Maryland taxpayers (those who pay sales tax, income tax, or property tax), and are thereby similarly situated to the Plaintiff, Elinor H. Kerpelman, as far as their property interest and social interest in the purposes of her suit are concerned.
5. The allegations and purposes set forth in the complaint of Elinor H. Kerpelman, Complainant, are interests and allegations which would apply equally to every member of the North American Habitat Preservation Society; and particularly the prayers for relief are desired vigorously to be granted, by each member of the Society, and by the Society.
- The petitioners believe that by applying to intervene in the within suit, they illustrate to the court a small proportion of those substantial numbers of citizens who have a direct interest, and a serious stake, in the outcome of the within suit; they believe that these interests can be better protected, and more fully elucidated for the court, as well the issues in the case, should they be allowed to intervene as plaintiffs.
6. (Intervention of Right.) Further, the Individual Petitioner herein, Grabarck, and the Society, believe, and therefore allege, that their interest in the subject matter of the suit, namely, ownership of wetlands, is or may be inadequate, in that Plaintiff Kerpelman's interest as a citizen is or may be

directed toward property, ecological, and monetary considerations, while the Petitioners have supravening interests in their natural resource and environmental heritage, anti-pollution, and governmental cooperation factors involved in the suit, all of which, they contend specifically are protected by the Fourteenth, Fifth, Ninth and Tenth Amendments to the United States Constitution; the Petitioners will be unqualifiedly bound by a judgment in the action should the fee title to the lands in question be determined to be in the developers referred to in the suit, or in the State of Maryland in some non-trust capacity, or in the Defendant Board of Public Works; likewise the Petitioners are so situated, as users and beneficiaries of said wetlands as to be unqualifiedly deprived of the benefits and uses mentioned in the Bill of Complaint to flow from said lands as marshlands and wetlands, but which will be cut off by filling or disposal of said lands, including, but not exclusively, destruction forever of the Petitioners' natural resource and environmental heritage.

7. (Intervention by Permission of the Court.) The Petitioners claim to ownership of the lands in question, and to relief, has questions of law in common with the claims of Complainant Kerpelman; in addition to the matters alleged in paragraph 6 hereof.
8. (Class Action.) Many persons, including the individual members of the Society, and organizations are similarly situated to the Petitioners, by virtue of their interest in the subject matter of the suit over and above the interest of Complainant Kerpelman, and they constitute a class; young persons, residents, members of conservation and recreation organizations, too numerous to allow of practical joinder, but the claims of Petitioners are representative of the claims of all of this substantial class, who may not be entirely represented by the claims of the Plaintiff, and the petitioners will fairly and

adequately represent the interests of all of these.

WHEREFORE, the Petitioners pray that they may be permitted to intervene as Plaintiffs in the within case.

AND, AS IN DUTY BOUND, ETCETERA.

Leonard J. Kerpelman,
Attorney for Petitioners
The North American Habitat Preser-
vation Society, and R. Doyle
Grabarck

THE NORTH AMERICAN HABITAT PRESERVATION
SOCIETY, by R. Doyle Grabarck, President
Box 869
Adelphi, Maryland 20783

R. Doyle Grabarck, Individually
Box 869
Adelphi, Maryland 20783

AFFIDAVIT

CITY OF
STATE OF MARYLAND, to-wit:

Before me, the subscriber, a notary public in and for the County and State aforesaid, personally appeared R. Doyle Grabarck, both Individually, and as President of the North American Habitat Preservation Society, this day of January, 1970, and made oath in due form of law that the matters and facts set forth in the foregoing Petition are true to the best of his knowledge and belief, and that the said Petition is the Petition of himself Individually, and of the said North American Habitat Preservation Society.

Notary Public

I HEREBY CERTIFY THAT a copy of the foregoing was mailed this day of January, 1970, to Thomas B. Perkins, III, Esq., Mercantile Trust Building, Attorney for Maryland Marine Properties, Inc.; Francis B. Burch, Esq., Attorney General of Maryland, 1201 One Charles Center, Baltimore; and Joseph H. Young, Esq., 901 First National Bank Bldg., Baltimore, Attorney for James B. Caine, Inc.

Leonard J. Kerpelman

ELINOR H. KERPELMAN,

Complainant

v.

MARVIN MANDEL, et al.,

Defendants

IN THE

CIRCUIT COURT OF

WORCESTER COUNTY

Equity No. 8934

ORDER TO SHOW
CAUSE

Upon the foregoing Petition and Affidavit, it is this day of
1970, by the Circuit Court for Worcester County, ORDERED,

That the Defendants show cause, on or before the day of
1970, if any they may have, why the Petition to Intervene of the North American Habitat Preservation Society, and of R. Doyle Grabarck, Individually, should not be granted.

PROVIDED, that a copy of the foregoing Petition and Affidavit, and of this Order to Show Cause, be served on the Defendants and each of them by mailing a copy thereof to their counsel on or before the day of
1970.

Judge

W.H. Oster

ELINOR H. KERPELMAN,	'	IN THE
	'	CIRCUIT COURT FOR
Complainant	'	WORCESTER COUNTY
v.	'	Equity No. 8934
MARVIN MANDEL, et al.,	'	
Defendants	'	

: : : : :
ANSWER TO MOTION RAISING
PRELIMINARY OBJECTION

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Now comes Elinor H. Kerpelman, by Leonard J. Kerpelman, her solicitor, and for answer to Motion Raising Preliminary Objection, says:

1. That questions raised by the Bill of Complaint are, substantially, two:
 - A. The Board of Public Works of Maryland alleged to convey lands which it had no alienable title to, to the other Defendants.
 - B. The conveyance was for such a completely and totally inadequate consideration, that the Board of Public Works could not have had a bona fide opinion that the consideration was adequate, and therefore fraud is inferred by the Complainant.

2. It is not seen how, in any sense A, by any stretch of any except the most fertile imagination question B could be so; however, it is denied, to be perfectly clear and explicit, that either is a "political question".

Leonard J. Kerpelman
Attorney for Complainant

MEMORANDUM OF AUTHORITY

1. No authority can really be cited for what is quite plain, clear and explicit on the face of the Bill of Complaint, it is respectfully suggested.
2. However, the "One Man-One Vote" case in the Maryland Court, in which an opinion was rendered, it is believed by Judge Barnes, is cited on the subject of "political question", in which case the Court expounded at some length on what is and what is not a political question, and found that the subject of One Man-One Vote is not a political question, and found also that the term "political question" is a semantic term more than it is a legal term, and it is respectfully argued that if it is not a "political question", then it strains credulity to suggest that the Board of Public Works' authority to give away, or nearly give away, as cavalierly as it may wish, public lands, is also not a political question; it is not believed, in actuality, that the Defendant Caine seriously suggests that the inalienability of the state's title is a political question.

3. On the inalienability of the state's title, *Shively v. Bowlby*, 152 U. S. 11, (1891), which will be cited at length in the Plaintiff's brief to be submitted before the pending hearing on demurrer.

Leonard J. Kerpelman
Attorney for Complainant

I HEREBY CERTIFY that a copy of the foregoing was mailed this 10th day of November, 1969, to Lee W. Bolte, Esq., Main St., Berlin, Md., 21811, Thomas Perkins, III, Esq., 1400 Mercantile Trust Building, Francis B. Burch, Esq., 1201 One Charles Center, and Joseph H. Young, Esq., 901 First National Bank Building, Baltimore, Maryland.

Leonard J. Kerpelman

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NOV 13 1969
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C.

Only
ELINOR H. KERPELMAN,

Plaintiff

v.

MARVIN MANDEL, et al.,

Defendants

IN THE

CIRCUIT COURT FOR

WORCESTER COUNTY

Equity #8934

• • • • •
MOTION NE RECIPIATUR
TO DEMURRER OF
MARYLAND MARINE

Now comes Elinor H. Kerpelman, by Leonard J. Kerpelman, her solicitor, and prays that the demurrer of the Defendant Maryland Marine Properties, Inc., heretofore filed, be not received, for that:

The said "Demurrer", and paragraph number 3 thereof, states "Plaintiff is barred by laches"; the defense of "laches", is a factual defense, and has no proper place in a demurrer; the Plaintiff being confronted by a demurrer containing such material knows not how to meet the matter to be presented upon argument or briefing, and is unable therefore to reasonably prepare for the presentation of his defense to the demurrer.

WHEREFORE, the Plaintiff prays that the said demurrer be not received.

RECEIVED
NOV 10 1969
LEONARD J. KERPELMAN
Attorney for Plaintiff

MEMORANDUM OF AUTHORITIES

Poe, Pleading and Practice in Maryland.

RECEIVED
NOV 10 1969
LEONARD J. KERPELMAN
Attorney for Plaintiff

I HEREBY CERTIFY that a copy of the foregoing was mailed this 4th day of November, 1969, to Thomas P. Perkins, III, Esq., Mercantile Trust Bldg., Lee W. Bolte, Esq., 103 N. Main St., Berlin, Md., Francis B. Burch, 1201 One Charles Center, Joseph H. Young, Esq., 901 First Nat'l. Bank Bldg., Baltimore, Maryland.

LEONARD J. KERPELMAN

Handwritten signature/initials

IN THE CIRCUIT COURT FOR WORCESTER COUNTY, MARYLAND

ELINOR H. KERPELMAN,	;	
Complainant	;	
vs.	;	In Equity.
HON. MARVIN MANDEL,	;	Cause No. 8934
Governor, et al.	;	
Defendants	;	
	;	
	;	

MOTION RAISING PRELIMINARY OBJECTION

James B. Caine, Inc., one of the Defendants, by Sanford and Bolte, its Solicitors, moves this Court pursuant to Rule 323 (A) (1) of the Maryland Rules for an Order dismissing the Bill of Complaint filed herein and as grounds for this Motion alleges that this Court lacks jurisdiction over the subject matter of said Bill of Complaint, since it involves a political question and not a justiciable question.

SANFORD and BOLTE

By Lee W. Bolte
Main Street
Berlin, Maryland 21811
641-0700; 0701

REQUEST FOR HEARING

James B. Caine, Inc. requests a hearing.

SANFORD and BOLTE

By Lee W. Bolte

I HEREBY CERTIFY that a copy of the foregoing Motion and Request for Hearing was this 21st day of October, 1969, mailed to Francis B. Burch, Esq. Office of the Attorney General, One Charles Center, Baltimore, Maryland 21201; to Leonard Kerpelman, Esquire, 900 Light Street, Baltimore, Maryland 21230; and to Thomas Perkins, Esquire., Venable, Baetjer & Howard, 1400 Mercantile Trust Building, Baltimore, Maryland 21202.

LS/

Lee W. Holte

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ELINOR H. KERPELMAN,	:	IN THE
Complainant,	:	CIRCUIT COURT
v.	:	FOR
HONORABLE MARVIN MANDEL,	:	WORCESTER COUNTY
et al., constituting the Board	:	No. 8934 Chancery
of Public Works of Maryland,	:	
JAMES B. CAINE, INC. and	:	
MARYLAND MARINE PROPERTIES, INC.,	:	
Defendants.	:	

DEMURRER OF DEFENDANT BOARD OF PUBLIC WORKS

The Board of Public Works, a Defendant, by Francis B. Burch, Attorney General, Jon F. Oster, Assistant Attorney General, and Richard M. Pollitt, Special Attorney, its attorneys, demurs to the Bill of Complaint and to each and every paragraph thereof because:

1. The Bill does not state a cause of action.
2. The Bill does not allege facts amounting to a cause of action.
3. The Bill does not allege facts sufficient to support the relief prayed.
4. Article 78A, Section 15 of the Annotated Code of Maryland (1965 Replacement Volume) provides:

"Any real or personal property of the State of Maryland or of any board, commission, department or agency thereof, and any legal or equitable rights, interests, privileges or easements in, to, or over the same, may be sold, leased, transferred, exchanged, granted or otherwise disposed of to any person, firm, corporation, or to the United States, or any agency thereof, or to any board, commission, department or other agency of the State of Maryland for a consideration adequate in the opinion of the Board of Public Works, or to any county or municipality in the State subject to such conditions as the Board of Public Works may impose. If said real or personal property of the State of Maryland, disposed of hereunder, or any legal or equitable rights, interests, privileges

or easements in, to, or over the same is under the jurisdiction or control of any board, commission, department or other agency of the State, the deed, lease or other evidence of conveyance of any such property or right or interest therein, disposed of hereunder, shall be executed on behalf of such board, commission, department or agency of the State, by the highest official thereof, and by the Board of Public Works, and if any of said real or personal property or any legal or equitable rights, interests, privileges or easements in, to, or over the same, disposed of hereunder, is not under the jurisdiction or control of any particular board, commission, department or other agency of the State, the deed, lease or other evidence of conveyance of said property or interest therein shall be executed by the Board of Public Works only; provided, however, that whenever any State department, agency or commission leases State-owned property under its jurisdiction and control to any State employee, agent, servant or other individual in State service for purposes of permitting such person to maintain a residence therein, such lease shall be executed by the department, agency or commission having such control or jurisdiction over such property, and, additionally, shall be approved by the budget Director, which approval shall be a condition precedent to the validity of the lease. All such conveyances shall be made in the name of the State of Maryland acting through the executing authority or authorities herein provided for. As used herein, the term 'real or personal property or any legal or equitable rights, interests, privileges or easements in, to, or over the same' shall include the inland waters of the State and land under said waters, as well as the land underneath the Atlantic Ocean for a distance of three miles from the low watermark of the coast of the State of Maryland bordering on said ocean, and the waters above said land. If the consideration received for the disposition of any real or personal property or interest therein is other than real or personal property, such property so received shall be held and accounted for in the same manner as other property within the jurisdiction and control of the board, commission, department or other agency of the State receiving such property. If the consideration received for any such disposition is cash, in whole or in part, the proceeds shall be accounted for and remitted to the State Treasurer; except that any consideration received in cash for the disposition of an asset of a substantial permanent nature, commonly called a capital asset, shall be applied solely to the State Annuity Bond Fund Account for the payment of the principal and interest of the bonded indebtedness of the State and if such capital asset shall have been originally purchased with any special funds, the proceeds thereof shall revert to such fund only."

Said statute imposes no limitation upon the power of the Board of Public Works to dispose of the property which is the subject of this suit, and the Board was authorized as a matter of law to dispose of the property complained about.

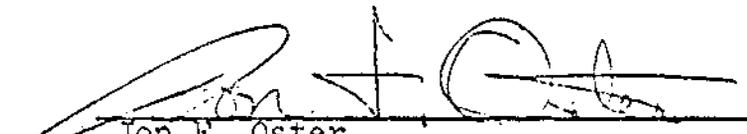
5. There is no allegation that the alleged alienation of State property was not "for a consideration adequate in the opinion of the Board of Public Works" as provided in the statute.

6. There is no allegation that the procedure of the Board of Public Works in connection with its disposition of the subject property was improper, defective or in any manner contrary to law.

7. The exercise of discretion of an administrative agency, if it acts within the scope of its authority, is not subject to review by a court of equity unless its power is fraudulently or corruptly exercised. Hanna v. Bd. of Ed. of Wicomico Co., 200 Md. 49.

8. And for other reasons to be shown at the hearing of this Demurrer.


Francis B. Burch
Attorney General

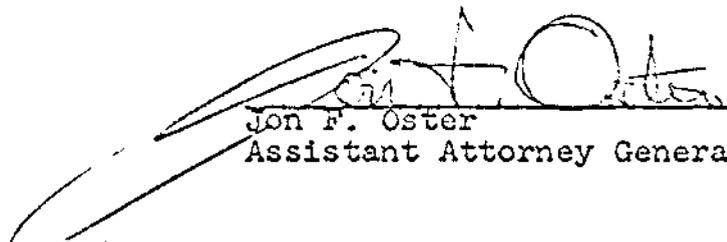

Jon F. Oster
Assistant Attorney General


Richard M. Pollitt
Special Attorney

1200 One Charles Center
Baltimore, Maryland 21201
539-4833

Attorneys for Defendant
Board of Public Works

I HEREBY CERTIFY that on this 20th day of October, 1969, a copy of the foregoing Demurrer was mailed, postage prepaid, to Leonard J. Kerpelman, Esq., Attorney for Complainant, 500 Equitable Building, Baltimore, Maryland 21202, to Thomas P. Perkins III, Esq., Attorney for Defendant Maryland Marine Properties, Inc., 1400 Mercantile Trust Building, Baltimore, Maryland 21202, and to Defendant James B. Caine, Inc., c/o James B. Caine, Resident Agent, 53rd Street and Ocean Highway, Ocean City, Maryland 21842.


Jon F. Oster
Assistant Attorney General

Ostly

Second Subpoena

No. 8934 CHANCERY DOCKET

**STATE OF MARYLAND, Worcester County, To-Wit:
The State of Maryland to**

Hon. Marvin Mandel, Governor, Louis L. Goldstein, Comptroller of the Treasury, and John Leutkemeyer, Treasurer; constituting the Board of Public Works of Maryland, State Office Building, 301 W. Preston Street, Baltimore, Maryland

(Serve one copy on the Governor at the above address)

GREETING:

We command and enjoin you that you do within the time limited by law, beginning on the first Monday of November next and ending fifteen days thereafter cause your answer or other defense to be filed to the complaint of

Elinor H. Kerpelman, 2403 W. Rogers Avenue, Baltimore, Maryland 21209

against you exhibited in the Circuit Court for Worcester County. Hereof fail not, as you will answer the contrary at your peril.

WITNESS, the Honorable E. McMaster Duer, Chief Judge of the First Judicial Circuit of Maryland, the 9th day of October, 19 69.

Issued the 9th day of October, 19 69.

TO THE DEFENDANT(S):

You are required to file your answer or other defense in the Clerk's Office within fifteen days after the return day named in the above subpoena. Personal attendance in Court on the day named is not necessary, but unless you answer or make other defense within the time named, Complainant(s) may obtain a decree *pro confesso* against you which upon proper proof may be converted to a final decree for the relief demanded.

Solicitor for Complainant(s)

Name Leonard J. Kerpelman, Esquire

Address 500 Equitable Building

Baltimore 2, Maryland

Frank W. Hall

Clerk

SHERIFF'S RETURN

TRUE COPY, TEST: *Frank W. Hall* CLERK

that they do, and must reasonably exercise this fiduciary charge, particularly as to their stewardship of property; by virtue of the Maryland Constitution and Declaration of Rights, and by virtue of the Fifth and Fourteenth Amendments to the Constitution of the United States, property of the Plaintiff and the class she represents may not be taken except by Due Process of Law. Said lands lie in Worcester County.

3. In 1968, contrary to said Article 6 Trusteeship, and contrary to the Fifth and Fourteenth Amendments of the federal Constitution, and to Due Process provisions of the Maryland Constitution, the Defendant Board of Public Works, then composed in part of different membership but being the same constitutional and statutory Board as the present Defendant Board, purported to convey 190 acres of submerged tidal lands which were then the property of the people of the State of Maryland, and inalienable, unto the Defendant James B. Caine, Inc.; and unto the Defendant Maryland Marine Properties, Inc., 197 acres; or did so by mesne purported conveyances under the alleged or contended authority of Article 78A, Sec. 16, though in fact said Article 78A, Sec. 16 gave the Defendant Board no authority to alienate these lands, and such purported alienation constituted a violation by the Defendants of Article 6 of the Maryland Declaration of Rights; and constituted, also, a taking of the property of the Plaintiff and all others similarly situated, other than by Due Process of Law.
4. The said lands referred to in paragraph 3 hereof, lay in Worcester County and were marshlands and wetlands, which is to say, submerged and partially submerged lands, marshes, and shallows, peculiarly adapted to the production of certain important forms of marine life, and constituting an important link in the food chain of many economically valuable wild species of fish, animal and bird life, which abound in Maryland, and upon her waters, and which are owned in common, and used by all of the members of the class on whose behalf this

suit is brought; as a consequence of said purported sale, the Plaintiff and all others similarly situated will suffer great economic loss, due to the decline which the purported sale, and consequent filling, will cause, as will be shown by experts at trial, to the fin and shellfish industry of Maryland, and to the vacation and recreation industry, which economic decline will cause loss of tax revenue, which will in turn cause an increase in taxes assessed and collected of the Plaintiff; and she and the class will also be deprived of the economic value and benefit she and they would personally derive from recreational, commercial, and navigational use of said lands, she and they otherwise would have.

5. The ecological consequences of the purported sale of submerged lands, and the direct consequent effect upon the natural resources of the State of Maryland, lands and resources which are owned by the Complainant and all others similarly situated, and which are held inalienably in trust for her and the class which she represents in the within suit by the State of Maryland, is of extremely great magnitude, particularly as a result of the fact that allowance and Court approval of the sales questioned herein, will indubitably mean allowance and Court approval of future sales of similar lands in the same category, and will without question fatally seal the future of, and mark for destruction all future coastal bay "wetlands", submerged lands, swamps, marsh, and ecologically important lands of similar nature, all of which are in law inalienable, but the "sale" and consequent filling in of which will nevertheless not be stopped other than by Court intercession.
6. Said lands which were conveyed are intended to be, and are being, filled in and built up by those to whom they were conveyed, and their character as wetlands and marshlands is being completely obliterated, with the consequent destruction of support to said fish and animal species aforesaid

referred to in paragraph 5. The tax base increase consequent on said filling and development of said lands, will fail to counterbalance the cumulative economic loss to the state, and to the tax treasury of the state by a factor of from 100,000 to 1,000,000, as will be shown by experts at the trial hereof. These losses will have to be made up by increased tax payments in substantial amount, by the Plaintiff taxpayer and all others similarly situated. Natural resources folly is not free.

7. The lands aforesaid which were sold to Maryland Marine Properties, Inc., were sold by an exchange for other marshlands and wetlands, which are cumulatively only one-half as productive of the important species of marine life and products as those which were conveyed to the said Maryland Marine Properties, Inc.; those sold to the Defendant James B. Caine, Inc., were sold for a completely and totally inadequate money consideration, namely one hundred dollars per acre. Said lands which were sold to Maryland Marine Properties, Inc., were exchanged for wetlands and marshlands as aforesaid worth only \$41,000 while the lands conveyed to it were worth two hundred times as much in fair market monetary value; the lands conveyed to James B. Caine, Inc., were worth approximately five hundred times as much in fair market monetary value as the monetary consideration received by the Defendant Board of Public Works. The economic value of the ecologic destruction caused is very great, as will be shown by experts at trial. The Board of Public Works was without authority under Article 78A, Section 15 to dispose of said lands for such completely inadequate consideration. Plaintiff draws an inference of fraud or mistake, and so alleges.

8. The Complainant and all others similarly situated will be irreparably injured and damaged and have been so, by the said conveyances to the defendants, Maryland Marine Properties, Inc., and James B. Caine, Inc., in that valuable property, which is ecologically irreplaceable, owned by them or held in trust for them by the Defendant Board of Public Works, has

been disposed of, and closed off to the wild natural resource cycle of which it was a most essential, irreplaceable part, and the Complainant and all others similarly situated are deprived of the use and benefit of said lands and waters, which they otherwise would have; and this is in return for a totally inadequate contribution by the new purported "owners" of the said lands into the state treasury by way of real estate taxes paid and to be paid, the value of which taxes will never compensate for the deprivation of said lands and the irreparable damage and injury which will be caused to the natural products and natural resources of the State of Maryland by the ecological disruption caused by the filling and loss of said wetlands, marshlands and shallows; which disruption may reasonably be expected to cause or substantially contribute to natural resource and wildlife losses of many millions of dollars measured in financial terms alone.

10. The Defendant corporations are proceeding with great speed to fill in and eradicate as marshland and wetland, the lands in question.
11. The Complainant has no adequate remedy at law.

WHEREFORE, the Complainant prays:

- (a) That this case be advanced on the Court Docket for immediate trial, and hearing on any motions which may be filed.
- (b) That a Mandatory Injunction may issue, requiring the Defendants, Maryland Marine Properties, Inc. and James B. Caine, Inc., to reconvey to the State of Maryland those lands in Worcester County which are the subject of the within suit.
- (c) That the Court declare the Deeds of Conveyance or mesne Deeds of Conveyance made by the Board of Public Works of Maryland of lands in Worcester County, Maryland, unto Maryland Marine Properties, Inc. and James B. Caine, Inc., which conveyances were made in 1968, of 197 acres and 190 acres, respectively, more or less, to be null, void, and of no effect, and that title remains in the People of Maryland.

(d) That the Complainant may have such other and further relief as the nature of her case may require.

AND, AS IN DUTY BOUND ET CETERA.

LS
LEONARD J. KERPELMAN
Attorney for Complainant
500 Equitable Building
Baltimore 2, Maryland
SA 7-8700

LS
ELINOR H. KERPELMAN

ELINOR H. KERPELMAN
2403 W. Rogers Avenue
Baltimore, Maryland 21209,

Complainant,

v.

HON. MARVIN MANDEL, Governor,
LOUIS L. GOLDSTEIN, Comptroller of the Treasury, and
JOHN LEUTKEMEYER, Treasurer;
constituting the BOARD OF PUBLIC WORKS OF MARYLAND,
and
JAMES B. CAINE, INC., a Maryland corporation,
and
MARYLAND MARINE PROPERTIES, INC.,
a Maryland corporation,

Defendants.

"
"
"
IN THE
"
CIRCUIT COURT
"
OF
"
WORCESTER COUNTY
"
#8934
Chancery
"
Equity No.

" " " " " " " "

INTERROGATORIES TO
THE DEFENDANT BOARD

Now comes the Plaintiff and pursuant to the Maryland Rules submits the following Interrogatories to be answered 15 days after filing of your responsive pleading to the Bill of Complaint.

1. When were the lands in question conveyed?
2. At what meeting (date?) was conveyance decided upon for each acreage?
3. Was notice of the meetings given to the public in advance?
4. Was the agenda of the meetings published to the public in advance? How?
5. Was the action of the Board when the conveyances were made, reported in the proceedings of the Board? How? Where are copies?



Leonard J. Kerpelman

Mr. Sheriff:

Serve above with Summons and Complaint, to Defendants ~~Mandel, Leutkemeyer, Goldstein, Caine and Maryland Marine.~~



Leonard J. Kerpelman
Attorney for Complainant

TRUE COPY, TEST:  CLERK

ELINOR H. KERPELMAN, : IN THE
Plaintiff : CIRCUIT COURT
vs. : FOR
HON. MARVIN MANDEL, : WORCESTER COUNTY
Governor, et al, :
Defendants :
Chancery No. 8934

DEMURRER OF DEFENDANT
MARYLAND MARINE PROPERTIES, INC.

Defendant, Maryland Marine Properties, Inc., by its attorneys, Raymond D. Coates, Thomas P. Perkins III and Robert A. Shelton, demurs to the Bill of Complaint filed by Plaintiff, Elinor H. Kerpelman, herein and to each and every paragraph thereof and as grounds for said Demurrer states as follows:

1. Plaintiff has totally failed to allege any facts which would be sufficient to constitute a cause of action or entitle her to the relief as prayed in the Bill of Complaint.
2. Plaintiff has totally failed to allege sufficient facts to establish her standing to sue in this case.
3. Plaintiff is barred by laches.
4. Such other and further grounds as will be set forth at the hearing on this Demurrer.

WHEREFORE, Defendant, Maryland Marine Properties, Inc., prays that this Honorable Court sustain its Demurrer without leave to amend, that the Bill of Complaint be dismissed as

against Defendant, Maryland Marine Properties, Inc. and that Defendant be awarded its cost of this suit.

Raymond D. Coates
4 Broad Street
Berlin, Maryland 21811
641-1515

Thomas P. Perkins III
Thomas P. Perkins III

Robert A. Shelton
Robert A. Shelton

1400 Mercantile Trust Building
Baltimore, Maryland 21202
752-6780

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Demurrer and Memorandum of Law were mailed by me, postage prepaid, on this 20th day of October, 1969 to Leonard J. Kerpelman, Esquire, 500 Equitable Building, Baltimore, Maryland 21202, Attorney for Plaintiff Elinor H. Kerpelman; to Lee W. Bolte, Esquire, 103 N. Main Street, Berlin, Maryland 21811, Attorney for Defendant James B. Caine, Inc.; and to Fred Oken, Esquire, Office of Attorney General, 1200 One Charles Center, Baltimore, Maryland 21201.

Thomas P. Perkins III
Thomas P. Perkins III

ELINOR H. KERPELMAN,	:	IN THE
Plaintiff	:	CIRCUIT COURT
vs.	:	FOR
HON. MARVIN MANDEL,	:	WORCESTER COUNTY
Governor, et al,	:	
Defendants	:	Chancery No. 8934

* * * * *

MEMORANDUM OF LAW OF DEFENDANT
MARYLAND MARINE PROPERTIES, INC.
IN SUPPORT OF DEMURRER

On June 25, 1969, Elinor H. Kerpelman, the Plaintiff in this case, filed a suit against the Defendants named herein in Circuit Court No. 2 of Baltimore City (Case No. 4268A), alleging the same facts and requesting the identical relief prayed in this suit. Demurrers were filed by Defendant, Maryland Marine Properties, Inc., and by the Board of Public Works and a Motion Raising Preliminary Objection was filed by Defendant, James B. Caine, Inc. The Demurrers and the Motion came on for hearing before Judge James A. Perrott on September 16, 1969. Judge Perrott ruled from the bench, sustaining the Demurrers and granting the Motion on the ground that the allegations in the Bill of Complaint were insufficient. The Plaintiff was given leave to amend, but did not choose to do so. Instead, Plaintiff has seen fit to abandon the suit in Baltimore and to bring the same action all over again in Worcester County.

This Memorandum is filed on behalf of Maryland Marine Properties, Inc. It will, therefore, consider primarily the allegations of fact (such as they are) affecting this Defendant, and not the allegations affecting Defendant James B. Caine, Inc. with whom Maryland Marine Properties, Inc. has no connection.

This Honorable Court presently has pending before it the important case of Larmar Corporation v. Cropper, et al (Chancery No. 8935). The Larmar case concerns the rights and privileges under existing statutory law of the owners of riparian land to fill and make other improvements in front of their land without approvals from the Board of Public Works, the Worcester County Shoreline Commission or from any other regulatory agency.

The issues in the Larmar case are not present here. Although Maryland Marine Properties, Inc. possesses the same riparian rights as Larmar, it voluntarily sought and obtained all necessary approvals and permits for bulkheading and filling from the U. S. Corps. of Engineers, the Board of Public Works of Maryland, the Maryland Department of Water Resources and the Worcester County Shoreline Commission. The issuance of such permits is not challenged here.

As set forth in the Bill of Complaint, Maryland Marine Properties, Inc. also obtained, by purchase, a conveyance from the State of Maryland of the title of the State to 197 acres of submerged land lying between the high-water line along its riparian shore and the bulkhead line adjacent to the shore. This conveyance is the only state action which is attacked in this case; the Plaintiff demanding that a mandatory injunction be issued to enforce a reconveyance of the State's interest in such property. Plaintiff contends in paragraph 7 of the Bill of Complaint, as she did in the Baltimore suit, that the Board of Public Works acted fraudulently in making this conveyance. This is the essence of her suit.

The Demurrer of Defendant, Maryland Marine Properties, Inc. is based upon three separate and distinct grounds, each of which constitutes complete grounds for the granting of the Demurrer. First, Plaintiff has failed to allege any facts

which constitute a cause of action or which would entitle her to any relief in a court of equity. Second, under the well established law of Maryland, Plaintiff has totally failed to allege sufficient facts to support her standing to sue in this case. Third, Plaintiff is clearly barred by laches in failing to bring this suit until a year after the Board of Public Works, in public session, entered into the agreements which Plaintiff now so belately challenges.

I. Plaintiff has failed to allege sufficient facts to constitute a cause of action.

In this case, Plaintiff seeks the extreme equitable remedy of a mandatory injunction to force the reconveyance of property which Plaintiff alleges was originally conveyed in accordance with agreements made with the Board of Public Works in 1968. Although this Honorable Court has the power to grant such relief (Maryland Rule BB 70a.), it is a well established principle of equity that this power will only be exercised with the greatest caution.

In Paragraph 3 of the Bill of Complaint, Plaintiff alleges that in 1968 the Board of Public Works entered into the two agreements to transfer the interest of the State in 190 acres of submerged land to the Defendant, Caine, and 197 acres of submerged land to Defendant, Maryland Marine Properties, Inc. Plaintiff concedes that these conveyances were made in accordance with the statutory authority granted by the Legislature to the Board of Public Works pursuant to the provisions of Section 15 of Article 78A of the Annotated Code of Maryland (1965 Replacement Volume). This statute is both broad and specific with regard to the grant of power to the Board and provides in material part as follows:

"Any real or personal property of the State of Maryland or of any board, commission, department or agency thereof, and any legal or equitable rights, interest, privileges or easements in, to, or over the same, may be sold, leased, transferred, exchanged, granted or otherwise disposed of to any person, firm, corporation, or to the United States, or any agency thereof, or to any board, commission, department or other agency of the State of Maryland for a consideration adequate in the opinion of the Board of Public Works herein, the term 'real or personal property or any legal or equitable rights, interests, privileges or easements in, to, or over the same' shall include the inland waters of the State and land under said waters, as well as the land underneath the Atlantic Ocean for a distance of three miles from the low watermark of the coast of the State of Maryland bordering on said ocean, and the waters above said land....."

The foregoing statute gives the Board complete authority to convey any real or personal property of the State of Maryland to any person "for a consideration adequate in the opinion of the Board of Public Works". There is no question here that the provisions of the statute were followed. Plaintiff's sole complaint is that the consideration paid was inadequate.

It is well settled that judicial review of discretionary actions of State agencies, particularly one as prestigious as the Board of Public Works, is extremely limited. This is particularly true where the Legislature has granted broad authority such as set forth in Section 15 of Article 78A without establishing any procedures for administrative or judicial review. In such circumstances, a court cannot sit as a reviewing body to "second-guess" the judgment of the Board of Public Works in exercising its statutory powers, particularly in a matter such as the adequacy of consideration. The law is clear that in order to challenge in court such discretionary actions of the Board, Plaintiff must allege facts to establish fraud, corruption, or such breach of trust by the members of the Board as to be equivalent to fraud.

In Coddington v. Helbig, 195 Md. 330, 337 (1950), the Court of Appeals stated the law to be as follows:

"The law is firmly established that a court of equity, on the suit of a taxpayer, will restrain a municipal corporation or an administrative agency from entering into or performing an unlawful or ultra vires contract, when such action may injuriously affect the taxpayer's rights and property. But where the action of a municipal corporation or administrative agency is within the scope of its authority, and does not affect the vested rights of liberty or property, the court will not review its exercise of discretion, unless such exercise is fraudulent or corrupt or such abuse of discretion as to amount to a breach of trust." (emphasis supplied)

Similar statements are found in Hanna v. Board of Education, 200 Md. 49 (1950) and Terminal Construction Corp. v. Board of Public Works (Cir. Ct. of Baltimore City, Daily Record, July 29, 1957). In an excellent law review article on the subject, Judge Oppenheimer set forth the applicable standards as follows:

"Where the determination of the administrative tribunal is essentially legislative in character or where it does not directly affect vested rights of liberty or property, the Court will not review the exercise of discretion, unless it can clearly be shown that the power of the tribunal was corruptly or fraudulently used. The Court will intervene if there is no evidence to support the action of the administrative agency, and will require the agency to exercise its discretion if action is required by statute. But the Court will not interfere with or control the method of the exercise of discretion or the performance of any duty requiring the exercise of judgment, nor will it correct errors of discretion which have honestly been made in the discharge of such duty within the limits of the prescribed standard." Oppenheimer, Administrative Law in Maryland, 2 Md. L. Rev. 185, 209 (1938). [emphasis supplied]

Plaintiff puts extreme emphasis on Article 6 of the Maryland Declaration of Rights. Article 6 is a general provision applicable to public servants stating that "all persons invested with the Legislative or Executive powers of

Government are the Trustees of the Public, and as such accountable for their conduct." This statement is such an integral part of the common law that it hardly needs to be stated. All public servants must act with integrity and in good faith, which is exactly what the cases cited above hold. Article 6 cannot be read, however, by any stretch of the imagination, as creating the right of judicial review of discretionary acts of the Legislative or Executive branches of Government absent a showing of fraud.

The Bill of Complaint is totally devoid of any factual allegations with regard to fraud. Plaintiff herself admits this in Paragraph 7 by stating at the conclusion thereof that she merely "draws an inference of fraud." The only fact alleged in the Bill of Complaint with regard to Maryland Marine Properties, Inc. is that the State's interest in the 197 acres of wetlands acquired were exchanged for wetlands and marsh lands which Plaintiff alleges were worth \$41,000. The balance of the Complaint consists of pure speculation and wild charges, apparently intended primarily for the sake of publicity and not for the serious consideration of this Honorable Court. The only facts alleged indicate that a substantial consideration was received by the State in connection with the exchange with Maryland Marine Properties, Inc. and admittedly one which was deemed "adequate in the opinion of the Board of Public Works" which is the only requirement set forth in the statute.

Fraud is a most serious charge and becomes all the more so when made against public officials of the standing of the Governor, the Comptroller and the Treasurer of the State of Maryland. Such officials and the persons with whom they

contract in good faith should not and cannot be required to answer to such charges without allegations of fact of the most convincing nature. They certainly cannot be held to answer to the totally frivolous and unsubstantiated charges made in the Bill of Complaint in the instant case. Therefore, the Court should sustain Defendant's Demurrer inasmuch as the Plaintiff has totally failed to allege facts which would constitute a cause of action upon which any relief can be granted in a court of equity.

One additional point should be mentioned. Plaintiff's chief contention is the charge that the Board of Public Works acted fraudulently in making the conveyances challenged in this case. Although the Bill of Complaint is often confusing and difficult to follow, Plaintiff also appears to be making the totally inconsistent argument that the Board of Public Works lacked the authority to make the conveyances in the first place. This point can be readily disposed of. The Board of Public Works, under Section 15 of Article 78A, has full authority to sell or otherwise dispose of any real or personal property of the State of Maryland. The statute specifically defines such property interests to include "the inland waters of the State and land under said waters." There is no question in this case that this is the property interest of the State which the Board conveyed to Maryland Marine Properties, Inc.

In the most recent case on the subject, Causey v. Gray, 250 Md. 380, 387 (1968), Judge Barnes clearly stated that it is "well established that the title to land under navigable water is in the State of Maryland, subject to the paramount right of the United States to protect navigation in the navigable waters." Again, this is the title of the State which was conveyed

in this case. In 50 Op. A.G. 452, 454 (1965) it is stated that "title to all navigable waters and the soil below the high-water mark of those waters is vested in the State as successor to the lords proprietary who had received it by grant from the Crown." Plaintiff relied heavily on this opinion in the Baltimore case.

The law is clear that the State does hold title to submerged land, subject, of course, to the rights of the owner of the riparian shores. Section 15 of Article 78A gives the Board of Public Works full authority to convey such title to the riparian owner, which is exactly what the Board did, and properly so, in this case.

II. Plaintiff lacks standing to sue.

As indicated above, the Bill of Complaint is totally without merit. Independent of this consideration, it is also clear that Plaintiff lacks standing to sue in this case.

Elinor H. Kerpelman, Plaintiff, in paragraph 1 of her Bill of Complaint, bases her standing to sue solely upon the allegation that she is a "taxpayer of the State of Maryland". This is her only interest in the case.

The limitations upon the right of a Maryland taxpayer to sue to set aside both legislative and administrative governmental actions have been very clearly enunciated in numerous decisions of the Court of Appeals. In the very first case on the subject, the Court made it clear that an individual cannot seek injunctive relief, such as is demanded here, unless the Plaintiff has suffered some special damage. Taxpayers, in such suits, must allege an "increase of the burden of taxation upon their property". Baltimore vs. Gill, 31 Md. 375, 394 (1869).

This rule has since been applied in many other cases. See, e.g., McKaig vs. City of Cumberland, 208 Md. 95,102 (1954); Baltimore vs. Keyser, 72 Md. 106, 108 (1890).

The Court of Appeals recently had occasion to restate the applicable rule in the leading case of Murray, et al vs. Comptroller, 241 Md. 383, 391 (1965). The issue in the Murray case concerned the constitutionality of a statute creating tax exemptions. Judge Oppenheimer made it clear in his opinion that in order to challenge such a statute or an administrative action such as is questioned here, the Plaintiff must allege facts to establish an increase in his taxes resulting therefrom. As Judge Oppenheimer observed:

"If the taxpayers cannot show a pecuniary loss or that the statute results in increased taxes to them, they have no standing to challenge it." (241, Md. at 391)

In the Murray case, Judge Oppenheimer carefully reviewed the facts and found that the Plaintiff did have standing inasmuch as it was clear that if church-owned property were placed on the tax rolls, property taxes for individual property owners, such as the Plaintiff in the Murray case, would definitely be reduced.

Not only does the Plaintiff in this case totally fail to allege any such facts, but the only facts alleged are directly to the contrary. In Paragraph 6, Plaintiff admits that the conveyances in question will actually increase the state tax base by putting additional property on the tax rolls. Such an admission is decisive on the question of standing.

Even though Plaintiff concedes that the transactions in question will actually increase State tax collections, Plaintiff engages in far-fetched speculations, totally unsupported

by factual allegations, in a futile attempt to establish standing as a taxpayer. In Paragraph 4, Plaintiff envisions that the conveyance of the relatively small acreage of wetlands challenged in this case will somehow produce disastrous consequences to the marine ecology of the State of Maryland. These dire predictions are also alleged somehow to apply to the State's vacation and recreation industry. These speculations are not supported by any allegations of facts. In Paragraph 5, Plaintiff engages in an even wilder prediction. She states that if the Court fails to act in this case, it "will indubitably mean allowance and Court approval of future sales of similar lands in the same category." In Paragraph 6, Plaintiff states the further unsupported conclusion that the conveyances in question will produce an economic loss to the State "by a factor of from 100,000 to 1,000,000." Again there is no allegation of fact. Instead, there is only the gratuitous statement that these dire consequences "will be shown by experts at the trial," without any allegation as to the content of such supposed testimony.

The only fact alleged by the Plaintiff is her concession that this case concerns only 190 acres of submerged land conveyed to Defendant Caine and 197 acres of submerged land conveyed to Defendant Maryland Marine Properties, Inc. With regard to the latter transaction, it is interesting to note that Plaintiff admits that Maryland Marine Properties, Inc. conveyed marsh lands to the State in exchange for marshlands which the Company acquired, thereby actually increasing rather than reducing the amount of such property in state ownership. Nevertheless, the critical point here, with regard to the Plaintiff's allegations, is that Plaintiff admits that

only an insignificant amount of the wetlands in the State of Maryland is involved in this case. We are concerned here with a total of less than 400 acres of wetlands whereas in the State of Maryland there are 3,190 miles of tidal shoreline supporting such wetlands. 1967-68 Maryland Manual, Page 19. In the light of such facts, no one could seriously contend that the specific conveyances in question here could have any meaningful impact upon marine ecology or bring about the horrendous consequences which Plaintiff predicts for the distant future resulting from the filling in of a comparatively inconsequential acreage of marsh. Plaintiff has totally failed to establish standing to sue and a demurrer should be sustained on this basis.

III. Plaintiff is barred by laches.

On September 30, 1969, Plaintiff filed this suit challenging transactions of the Board of Public Works which she states in her Bill of Complaint were completed in 1968. The Board of Public Works is a public body. Its statutory powers are exercised and performed in public session and are fully subject at such time to public scrutiny. Nevertheless, Plaintiff has seen fit to delay for more than a year the filing of a suit to challenge the agreements entered into by the Board of Public Works in 1968.

It is a well accepted maxim that equity "aids the vigilant and will not give relief to a person who has been dilatory in bringing his cause of action." James v. Zantzinger, 202 Md. 109, 116 (1953). In the recent case of Parker v. Board of Election Supervisors, 230 Md. 126 (1962), the Court of Appeals upheld the ruling of the trial court sustaining a demurrer and

dismissing an action in an election case on the grounds of laches. The court observed that laches is a "defense in equity against stale claims, and is based upon grounds of sound public policy by discouraging fusty demands for the peace of society". (230 Md. at 130)

The above quotation is particularly applicable to the allegations set forth in the Bill of Complaint in this case. Plaintiff belatedly seeks to reopen matters which have long since been closed. Her motive in so doing is to challenge state policy. Her real concern is the future application of such policy rather than with its application to the transactions questioned in this case. If these transactions were to be challenged at all, they should have been challenged when they were originally agreed upon by the Board of Public Works in 1968 and not more than a year later. Plaintiff is now barred by laches and a Demurrer should be sustained on this basis.

Conclusion

It is clear from the face of the Bill of Complaint in this case that the Plaintiff has utterly failed to allege a meritorious claim, lacks standing to sue and is guilty of laches. Plaintiff first brought this suit in Baltimore and failed in this effort. Defendant, Maryland Marine Properties, Inc., respectfully submits that this litigation should be finally concluded by the granting of its Demurrer without leave to amend.

Respectfully submitted,

✓

Raymond D. Coates

✓

Thomas P. Perkins, III

✓

Robert A. Shelton

that they do, and must reasonably exercise this fiduciary charge, particularly as to their stewardship of property; by virtue of the Maryland Constitution and Declaration of Rights, and by virtue of the Fifth and Fourteenth Amendments to the Constitution of the United States, property of the Plaintiff and the class she represents may not be taken except by Due Process of Law. Said lands lie in Worcester County.

3. In 1968, contrary to said Article 6 Trusteeship, and contrary to the Fifth and Fourteenth Amendments of the federal Constitution, and to Due Process provisions of the Maryland Constitution, the Defendant Board of Public Works, then composed in part of different membership but being the same constitutional and statutory Board as the present Defendant Board, purported to convey 190 acres of submerged tidal lands which were then the property of the people of the State of Maryland, and inalienable, unto the Defendant James B. Caine, Inc.; and unto the Defendant Maryland Marine Properties, Inc., 197 acres; or did so by mesne purported conveyances under the alleged or contended authority of Article 78A, Sec. 16, though in fact said Article 78A, Sec. 16 gave the Defendant Board no authority to alienate these lands, and such purported alienation constituted a violation by the Defendants of Article 6 of the Maryland Declaration of Rights; and constituted, also, a taking of the property of the Plaintiff and all others similarly situated, other than by Due Process of Law.

4. The said lands referred to in paragraph 3 hereof, lay in Worcester County and were marshlands and wetlands, which is to say, submerged and partially submerged lands, marshes, and shallows, peculiarly adapted to the production of certain important forms of marine life, and constituting an important link in the food chain of many economically valuable wild species of fish, animal and bird life, which abound in Maryland, and upon her waters, and which are owned in common, and used by all of the members of the class on whose behalf this

suit is brought; as a consequence of said purported sale, the Plaintiff and all others similarly situated will suffer great economic loss, due to the decline which the purported sale, and consequent filling, will cause, as will be shown by experts at trial, to the fin and shellfish industry of Maryland, and to the vacation and recreation industry, which economic decline will cause loss of tax revenue, which will in turn cause an increase in taxes assessed and collected of the Plaintiff; and she and the class will also be deprived of the economic value and benefit she and they would personally derive from recreational, commercial, and navigational use of said lands, she and they otherwise would have.

5. The ecological consequences of the purported sale of submerged lands, and the direct consequent effect upon the natural resources of the State of Maryland, lands and resources which are owned by the Complainant and all others similarly situated, and which are held inalienably in trust for her and the class which she represents in the within suit by the State of Maryland, is of extremely great magnitude, particularly as a result of the fact that allowance and Court approval of the sales questioned herein, will indubitably mean allowance and Court approval of future sales of similar lands in the same category, and will without question fatally seal the future of, and mark for destruction all future coastal bay "wetlands", submerged lands, swamps, marsh, and ecologically important lands of similar nature, all of which are in law inalienable, but the "sale" and consequent filling in of which will nevertheless not be stopped other than by Court intercession.
6. Said lands which were conveyed are intended to be, and are being, filled in and built up by those to whom they were conveyed, and their character as wetlands and marshlands is being completely obliterated, with the consequent destruction of support to said fish and animal species aforesaid

referred to in paragraph 5. The tax base increase consequent on said filling and development of said lands, will fail to counterbalance the cumulative economic loss to the state, and to the tax treasury of the state by a factor of from 100,000 to 1,000,000, as will be shown by experts at the trial hereof. These losses will have to be made up by increased tax payments in substantial amount, by the Plaintiff taxpayer and all others similarly situated. Natural resources folly is not free.

7. The lands aforesaid which were sold to Maryland Marine Properties, Inc., were sold by an exchange for other marshlands and wetlands, which are cumulatively only one-half as productive of the important species of marine life and products as those which were conveyed to the said Maryland Marine Properties, Inc.; those sold to the Defendant James B. Caine, Inc., were sold for a completely and totally inadequate money consideration, namely one hundred dollars per acre. Said lands which were sold to Maryland Marine Properties, Inc., were exchanged for wetlands and marshlands as aforesaid worth only \$41,000 while the lands conveyed to it were worth two hundred times as much in fair market monetary value; the lands conveyed to James B. Caine, Inc., were worth approximately five hundred times as much in fair market monetary value as the monetary consideration received by the Defendant Board of Public Works. The economic value of the ecologic destruction caused is very great, as will be shown by experts at trial. The Board of Public Works was without authority under Article 78A, Section 15 to dispose of said lands for such completely inadequate consideration. Plaintiff draws an inference of fraud or mistake, and so alleges.

8. The Complainant and all others similarly situated will be irreparably injured and damaged and have been so, by the said conveyances to the defendants, Maryland Marine Properties, Inc., and James B. Caine, Inc., in that valuable property, which is ecologically irreplaceable, owned by them or held in trust for them by the Defendant Board of Public Works, has

been disposed of, and closed off to the wild natural resource cycle of which it was a most essential, irreplaceable part, and the Complainant and all others similarly situated are deprived of the use and benefit of said lands and waters, which they otherwise would have; and this is in return for a totally inadequate contribution by the new purported "owners" of the said lands into the state treasury by way of real estate taxes paid and to be paid, the value of which taxes will never compensate for the deprivation of said lands and the irreparable damage and injury which will be caused to the natural products and natural resources of the State of Maryland by the ecological disruption caused by the filling and loss of said wetlands, marshlands and shallows; which disruption may reasonably be expected to cause or substantially contribute to natural resource and wildlife losses of many millions of dollars measured in financial terms alone.

10. The Defendant corporations are proceeding with great speed to fill in and eradicate as marshland and wetland, the lands in question.
11. The Complainant has no adequate remedy at law.

WHEREFORE, the Complainant prays:

- (a) That this case be advanced on the Court Docket for immediate trial, and hearing on any motions which may be filed.
- (b) That a Mandatory Injunction may issue, requiring the Defendants, Maryland Marine Properties, Inc. and James B. Gaine, Inc., to reconvey to the State of Maryland those lands in Worcester County which are the subject of the within suit.
- (c) That the Court declare the Deeds of Conveyance or mesne Deeds of Conveyance made by the Board of Public Works of Maryland of lands in Worcester County, Maryland, unto Maryland Marine Properties, Inc. and James B. Gaine, Inc., which conveyances were made in 1968, of 197 acres and 190 acres, respectively, more or less, to be null, void, and of no effect, and that title remains in the People of Maryland.

(d) That the Complainant may have such other and further relief as the nature of her case may require.

AND, AS IN DUTY BOUND ET CETERA.

18
LEONARD J. KERPELMAN
Attorney for Complainant
500 Equitable Building
Baltimore 2, Maryland
SA 7-8700

18
ELINOR H. KERPELMAN

ELINOR H. KERPELMAN
2403 W. Rogers Avenue
Baltimore, Maryland 21209,

Complainant,

v.

HON. MARVIN MANDEL, Governor,
LOUIS L. GOLDSTEIN, Comptroller of the Treasury, and
JOHN LEUTKEMEYER, Treasurer;
constituting the BOARD OF PUBLIC WORKS OF MARYLAND,
and
JAMES B. CAINE, INC., a Maryland corporation,
and
MARYLAND MARINE PROPERTIES, INC.,
a Maryland corporation,

Defendants.

"
"
"
IN THE
"
CIRCUIT COURT
"
OF
"
WORCESTER COUNTY
"
8934
Chancery
"
Equity No.

INTERROGATORIES TO
THE DEFENDANT BOARD

Now comes the Plaintiff and pursuant to the Maryland Rules submits the following Interrogatories to be answered 15 days after filing of your responsive pleading to the Bill of Complaint.

1. When were the lands in question conveyed?
2. At what meeting (date?) was conveyance decided upon for each acreage?
3. Was notice of the meetings given to the public in advance?
4. Was the agenda of the meetings published to the public in advance? How?
5. Was the action of the Board when the conveyances were made, reported in the proceedings of the Board? How? Where are copies?



Leonard J. Kerpelman

Mr. Sheriff:

Serve above with Summons and Complaint, to ~~Defendants Mandel, Leutkemeyer, Goldstein, Caine and Maryland Marine.~~



Leonard J. Kerpelman
Attorney for Complainant

TRUE COPY, TEST:  CLERK

filed Sept 30
Answer Oct 1

No. 8934 CHANCERY DOCKET

STATE OF MARYLAND, Worcester County, To-Wit:
The State of Maryland to

Hon. Marvin Mandel, Governor, Louis L. Goldstein, Comptroller of the Treasury, and John Leutkemeyer, Treasurer; constituting the Board of Public Works of Maryland, State Office Building, 301 W. Preston Street, Baltimore, Maryland

(Serve one copy on the Governor at above address, and one on Francis B. Burch, Esq., Attorney General of Maryland, One Charles Center, Baltimore 2, Maryland)

GREETING:

We command and enjoin you that you do within the time limited by law, beginning on the first Monday of October next and ending fifteen days thereafter cause your answer or other defense to be filed to the complaint of

Elinor H. Kerpelman, 2403 W. Rogers Avenue, Baltimore, Maryland 21209

against you exhibited in the Circuit Court for Worcester County. Hereof fail not, as you will answer the contrary at your peril.

WITNESS, the Honorable E. McMaster Duer, Chief Judge of the First Judicial Circuit of Maryland, the 30th day of Sept., 1969.

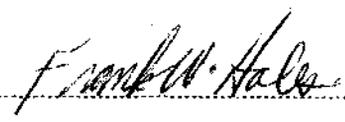
Issued the 30th day of Sept., 1969.

TO THE DEFENDANT(S):

You are required to file your answer or other defense in the Clerk's Office within fifteen days after the return day named in the above subpoena. Personal attendance in Court on the day named is not necessary, but unless you answer or make other defense within the time named, Complainant(s) may obtain a decree **pro confesso** against you which upon proper proof may be converted to a final decree for the relief demanded.

Solicitor for Complainant(s)

Name Leonard J. Kerpelman, Esquire
500 Equitable Building
Address Baltimore 2, Maryland



Clerk

SHERIFF'S RETURN

FILED 1969 OCT 1 11 AM

Extra Copies

LWB:drc

5124-II

IN THE CIRCUIT COURT FOR WORCESTER COUNTY, MARYLAND

ELINOR H. KERPELMAN,	:	
	:	
Complainant	:	In Equity
	:	
vs.	:	Cause No. 8934
	:	
HON. MARVIN MANDEL	:	
Governor, et al.	:	
	:	
Defendants	:	

ANSWER TO PETITION TO INTERVENE

James B. Caine, Inc., one of the Defendants, by Sanford and Bolte, its attorneys, in answer to the Petition to Intervene and Order to Show Cause issued thereon, opposes such intervention on the grounds that the Intervenor, North American Habitat Preservation Society has no proper standing to intervene (Horace Mann League vs. Board, 242 Md. 645, at page 652; Citizens Committee vs. County Commissioners, 233 Md. 398; Bar Association vs. District Title Co. 224 Md. 474, and Greenbelt vs. Jaeger, 237 Md. 456) and that the status of R. Doyle Grabarck, the other Intervenor, to intervene is not adequately set forth in said Petition.

WHEREFORE, Defendant, James B. Caine, Inc. prays this Honorable Court to deny the Petition to Intervene.

SANFORD and BOLTE

BY: LS
 Lee W. Bolte

I HEREBY CERTIFY that on this 2ND day of September, 1970, an exact duplicate copy of the foregoing was mailed, by regular United States Mail, postage prepaid, to the following:

1. Leonard J. Kerpelman, Esquire, Attorney for the Plaintiffs and the North American Habitat Preservation Society and R. Doyle Grabarck, Petitioners, 500 Equitable Building, Baltimore, Maryland 21202.

2. Robert A. Shelton, Esquire, and Thomas P. Perkins, III, Esquire, 1400 Mercantile Trust Building, Baltimore, Maryland, 21202, Attorneys for Defendant Maryland Marine Properties, Inc.

3. Raymond D. Coates, Esquire, 4 Broad Street, Berlin, Maryland, 21811, Attorney for Maryland Marine Properties, Inc.

4. Honorable Francis B. Burch, Attorney General, and Jon F. Oster, Esquire, 1200 One Charles Center, Baltimore, Maryland, 21201, Attorneys for the Board of Public Works.

5. Richard M. Pollitt, Esquire, Pollitt, Hughes & Bahen, 110 N. Division Street, Salisbury, Maryland, 21801, Attorney for Board of Public Works.

SANFORD AND BOLTE

BY: LS/

Lee W. Bolte

IN THE CIRCUIT COURT FOR WORCESTER COUNTY, MARYLAND

ELINOR H. KERPELMAN,
Complainant,

vs.

HON. MARVIN MANDEL,
Governor, et al.,

Defendants.

:
:
:
:
:
:
:

In Equity

Cause No. 8934

DEMURRER OF DEFENDANT JAMES B. CAINE, INC.

James B. Caine, Inc., one of the Defendants, by Sanford and Bolte, its attorneys, demurs to the Bill of Complaint filed herein and to each and every paragraph thereof, and as grounds for said Demurrer states as follows:

1. Plaintiff has totally failed to allege any facts which would be sufficient to constitute a cause or action or entitle hereto the relief as prayed in the Bill of Complaint.
2. Plaintiff has totally failed to allege sufficient facts to establish her standing to sue in this case.
3. Plaintiff is barred by laches.

In support of said Demurrer, this Defendant adopts the arguments heretofore made by the other Defendants herein, and also the Opinion of this Honorable Court relating to such Demurrers, which is dated August 31, 1970 and filed in this proceeding.

WHEREFORE, Defendant James B. Caine, Inc. prays this Honorable Court to sustain its Demurrer without leave to amend, to the end that the Complainant pay the costs of this proceeding.

SANFORD and BOLTE

BY: LS/
Lee/W. Bolte

I HEREBY CERTIFY, that on this 2ND day of September, 1970, an exact duplicate copy of the foregoing Demurrer was mailed, by regular United States mail, postage prepaid, to the following:

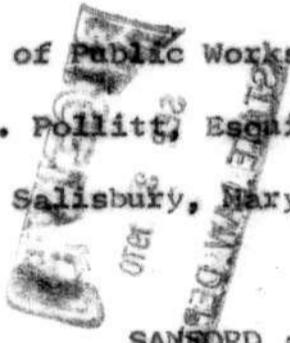
1. Leonard J. Kerpelman, Esquire, Attorney for the Plaintiffs and the North American Habitat Preservation Society and R. Doyle Grabarek, Petitioners, 500 Equitable Building, Baltimore, Maryland 21202.

2. Robert A. Shelton, Esquire, and Thomas P. Perkins, III, Esquire, 1400 Mercantile Trust Building, Baltimore, Maryland, 21202, Attorneys for Defendant Maryland Marine Properties, Inc.

3. Raymond D. Coates, Esquire, 4 Broad Street, Berlin, Maryland, 21811, Attorney for Maryland Marine Properties, Inc.

4. Honorable Francis B. Burch, Attorney General, and Jon F. Oster, Esquire, 1200 One Charles Center, Baltimore, Maryland, 21201, Attorneys for the Board of Public Works.

5. Richard M. Pollitt, Esquire, Pollitt, Hughes & Bahen, 110 N. Division Street, Salisbury, Maryland 21801, Attorney for Board of Public Works.



SANFORD and BOLTE

BY: LS
Lee W. Bolte

which may be filed.

- (b) That a Mandatory Injunction may issue, requiring the Defendants, Maryland Marine Properties, Inc., and James B. Caine, Inc., to reconvey to The State of Maryland those lands in Worcester County which are the subject of the within suit.
- (c) That the Court declare the Deeds of Conveyance or Mesne Deeds of Conveyance made by the Board of Public Works of Maryland of lands in Worcester County, Maryland, unto Maryland Marine Properties, Inc., and James B. Caine, Inc., which conveyances were made in 1968, of 197 acres and 190 acres, respectively, more or less, to be null, void, and of no effect, and that title remains in the People of Maryland."

To this Bill of Complaint, the Defendant Maryland Marine Properties, Inc. filed its Demurrer on October 20, 1969, together with an extensive memorandum raising three specific issues; namely, (1) a failure to allege sufficient facts to constitute a cause of action, (2) attacking the standing to sue of the Plaintiff, and (3) raising the question of laches. On October 21, 1969, the Defendant Board of Public Works filed its Demurrer citing the provisions of Section 15 of Article 78A of The Annotated Code of Maryland, and the authority of the Board of Public Works of Maryland as therein set forth, contending that, in the absence of any allegation of fraud or the facts supporting such an allegation, no cause of action was sufficiently stated to subject the actions of the Board of Public Works to the scrutiny of a Court of Equity.

On October 21, 1969, James B. Caine, Inc., one of the Defendants, filed a "Motion Raising Preliminary Objection", alleging the lack of jurisdiction of this Court over the subject matter of the Bill, on the grounds that a determination involved a "political

question", and "not a justiciable question".

On November 6, 1969, the Complainant filed a "Reply To 'Memorandum of Law of Maryland Marine In Support of Demurrer'".

On November 7, 1969, the Complainant filed a "Motion Ne Recipiatur To Demurrer Of Maryland Marine", based upon the contention that the Demurrer raised a question of laches which should be considered as a factual defense rather than a subject of a demurrer.

On November 17, 1969, the Complainant filed an "Answer To Motion Raising Preliminary Objection", denying the nature of the question to be "political", and summarizing the contentions of the Bill as being (a) that the Board of Public Works enjoyed no alienable title to the lands in question, (b) that "[t]he conveyance was for such a completely and totally inadequate consideration, that the Board of Public Works could not have had a bona fide opinion that the consideration was adequate, and therefore fraud is inferred by the Complainant".

On January 26, 1970, an organization allegedly known as "North American Habitat Preservation Society" filed a "Petition To Intervene As Plaintiffs", upon which the Court issued a Show Cause Order to the Defendants ordering them to show cause on or before February 16, 1970, if any they had, why the said Petition to Intervene should not be granted. The Defendant Maryland Marine Properties, Inc., filed its Answer to the Petition to Intervene, on February 24, 1970, alleging insufficient facts to establish the standing of the Petitioners to sue. On February 27, 1970, the Defendant, James B. Caine, Inc., filed a "Motion Ne Recipiatur As To Petition To Intervene As Plaintiffs", alleging the non-receipt of a copy of the said Petition, the existence of which the attorney for the said Defendant allegedly accidentally discovered in the office of the Clerk of this Court, on February 24, 1970.

On March 11, 1970, the Complainant filed a "Motion Ne Recipiatur" to the Motion Ne Recipiatur of the Defendant James B. Caine, Inc., founded upon the grounds that the Caine Motion was based upon "facts not apparent from the face of the record, and yet was not under affidavit". Interestingly enough, no copy of the Complainant's Motion Ne Recipiatur was apparently served upon the Defendant James B. Caine, Inc., or any of his attorneys until May 13, 1970, after which an amended certificate of mailing was apparently intended to be filed by the attorney for the Complainant on March 16, 1970.

On May 5, 1970, the Plaintiff filed a Memorandum of Law, the main body of which was a photo-copy of a memorandum filed, on September 15, 1969, in a similar case in the Circuit Court for Baltimore City.

On May 6, 1970, the Defendant James B. Caine, Inc., filed a "Memorandum In Support Of Preliminary Objection", the main body of which was a photo-copy of a brief filed in the same similar case in the Circuit Court for Baltimore City.

On May 11, 1970, the Complainant filed a "Motion For Summary Judgment Upon Some Issues", alleging "no dispute as to any material fact concerning the following issues"; namely, (a) [t]hat she is a taxpayer of the State of Maryland, (b) [t]hat she is a resident thereof in Baltimore City, and (c) [t]hat this suit is brought on her own behalf, and on behalf of all others similarly situated."

The Hearing was held on May 11, 1970 on all Demurrers, Motions, Petitions, etc., consistent with the notice of the assignment thereof mailed to all parties on April 8, 1970.

On May 15, 1970, the Complainant filed an "Answer To Memorandum Of Law Of Defendant James B. Caine, Inc.", in which the Complainant suggested that "counsel has missed the point", because of the contention of the Complainant that "nobody" has an alienable

title to the lands in question.

On June 17, 1970, the Complainant filed a "Supplementary Plaintiff's Memorandum Of Law", in which the Complainant stated to the Court that she was adopting the entire theory set forth in the case of Commonwealth of Virginia vs. City of Newport News, 164 S.E. 689, at page 696, and quoted from that case the theory upon which she relied.

PETITION TO INTERVENE

The first duty of the Court is obviously to dispose of the Petition to Intervene filed on behalf of the "North American Habitat Preservation Society", for whom Leonard J. Kerpelman, Esq. is "solicitor" as well as being the attorney for the Complainant. Based entirely upon the facts set forth in the said Petition as to the nature and composition of the said Society, and the interest which it has in this case, the Court has determined that it lacks standing to sue as a party Plaintiff, and therefore its Petition to Intervene would be denied. Horace Mann League vs. Board, 242 Md. 645, at page 652. Citizens Committee vs. County Commissioners, 233 Md. 398, Bar Association vs. District Title Co. 224 Md. 474, and Greenbelt vs. Jaeger, 237 Md. 456.

A certain R. Doyle Grabarck, Box 869, Adelphi, Maryland, 20783, has likewise joined as a Petitioner in the said Petition to Intervene, both as President of the said Society, and individually. As President of the Society, the Court would consider his capacity to sue to be co-existent with the Society, and of no greater magnitude. As an individual, however, he is apparently in the same position as the Complainant, Elinor H. Kerpelman, and the determination as to her standing will likewise be determinative of the standing of Mr. Grabarck. It seems also to follow that a determination of the contentions and issues raised by the Complainant would

likewise be determinative of the contentions and issues raised by Mr. Grabarck, particularly in view of the fact that each are represented by Mr. Kerpelman. Indeed, by paragraph 4 and 5 of the Petition to Intervene, the Petitioners have so stated, and have adopted the position of the Complainant. There is one major difference, however, between the Petitioner Grabarck and the Complainant Kerpelman. That difference is the fact that nowhere in the Petition to Intervene is it alleged that Mr. Grabarck is a taxpayer of the State of Maryland. The Petition to Intervene, therefore, by R. Doyle Grabarck, as an individual, will be, likewise, denied.

MOTIONS NE RECIPIATUR

The determination by the Court upon the Petition to Intervene, as hereinbefore set forth, makes unnecessary a consideration of the Motion Ne Recipiatur filed by the Defendant James B. Caine, Inc., or the Motion Ne Recipiatur filed by the Complainant to the Caine Motion Ne Recipiatur. It might be well for the Court to observe, however, that Counsel for the Complainant had due notice of the appearance of Lee W. Bolte, Esq., and the firm of Sanford and Bolte, on behalf of the Defendant James B. Caine, Inc., as early as October 21, 1969, upon the filing of the Caine Motion Raising Preliminary Objection. Mr. Kerpelman recognized this appearance in his service of November 4, 1969 of his "Reply", his Motion filed on November 7, 1969, and his Answer filed on November 17, 1969. He did ignore the appearance in his service of the said Petition to Intervene. The apparent failure of Counsel for Maryland Marine Properties, Inc., to receive a copy of the said Petition to Intervene is the fact that Mr. Kerpelman used an inadequate address therefor, according to his Certificate of Service, in that he omitted any reference to room numbers. The Clerk of this Court can hardly be held responsible for this defect in view of the fact that in his undated Certificate of Service of the said Petition to Intervene, Mr. Kerpelman alleged service upon a certain "Joseph H. Young, Esq., 901 First National

Bank Bldg., Baltimore, attorney for James B. Caine, Inc." The Clerk would have no way of knowing whether or not additional Counsel for the Caine Corporation was now in the case, and had simply failed to enter his appearance of record. Perhaps the Clerk, however, should be more careful, and require that the Certificate of Service by an attorney be dated, and that all attorneys of record be included within such Certificate.

MOTION RAISING PRELIMINARY OBJECTION

The Court should then next consider the preliminary objection raised by the Defendant James B. Caine, Inc., upon the question of whether or not the Bill of Complaint merely stated a political question, and not a justiciable issue. Granting that a reading of the Bill of Complaint would make it difficult to delineate a justiciable issue, and that the Bill appears to be more in the nature of a statement of a political position, requiring legislative attention or executive restraint, the memoranda subsequently filed on behalf of the Complainant have had the salutary effect of interpreting the meaning of the Bill of Complaint and articulating a position which presents a legal issue. In view of this subsequent elucidation, by counsel for the Complainant, the Court will entertain jurisdiction, and render a decision upon the issue as narrowly framed and presented to the Court by Complainant's Memoranda. The Motion of the Defendant James B. Caine, Inc., raising this preliminary objection will be overruled.

MOTION NE RECIPIATUR OF COMPLAINANT TO DEMURRER
OF MARYLAND MARINE PROPERTIES, INC.

The Court will entertain the Demurrer of the Defendant Maryland Marine Properties, Inc., and deny the Motion Ne Recipiatur filed thereto by the Complainant. In his Motion Ne Recipiatur thereto, Counsel for the Complainant has over simplified the law

with regard to the inclusion of a charge of laches in a demurrer.

"The defense of limitations or laches may be raised on demurrer where, on the face of the bill, it can be seen that it is a bar. Although, ordinarily, the defense of laches must be made by answer alleging facts showing lapse of time and prejudice to the Defendant, as discussed supra § 142, where the bill on its face shows both lapse of time and circumstances as suggest prejudice or acquiescence and call for explanation, the bill is demurrable." 9 M. L. E. "Equity", Section 152, and cases therein cited, including the 1969 Pocket Part.

The Court will concede that the question of whether or not a case of laches is presented within the four corners of the Bill of Complaint is indeed a close one, but if the question of laches was the only question before the Court for determination in this proceeding at this time, the Court would insist upon a Hearing to spread the facts upon the record, particularly as they relate to prejudice to the Defendant Maryland Marine Properties, Inc. The Court, therefore, would take the position that it would not sustain the Demurrer on that grounds alone, but defer it as a matter of defense. Such a position by the Court, however, does not dispose entirely of the matter now for determination. The fact that a demurrer contains an invalid, unsupported or otherwise irrelevant issue, or the fact that the grounds assigned do not meet the approval of counsel for the opposing party or the Court does not justify the rejection of the pleading in toto. Even if one of the grounds assigned in a demurrer is found to be lacking in legal efficacy, the remaining grounds, if any there be, survive and are entitled to the consideration of the Court. Such is the situation presented here.

DEMURRERS

The Court is well aware of, and has had several opportunities to apply, the position of the Court of Appeals of Maryland with regard to demurrers filed in opposition to petitions for declaratory relief. *Kelley vs. Davis*, 233 Md. 494. As mentioned early in this Opinion, however, this Court does not envision the Bill of Complaint in this case to state the grounds for, or the request for, a declaration of the rights of the parties. The declaration which the Complainant seeks is merely a declaration to support the issuance of the "Mandatory Injunction" which she prays. In other words, it would be necessary to "declare" invalid the conveyances referred to within the Bill and in prayer for relief "(c)" in order to grant the relief prayed in "(b)" of the prayers for relief. There is no basis for, or necessity for, any other, further, or fuller declaration of rights of the parties. The Court is, therefore, of the opinion that the rule against entertaining a demurrer to a petition for declaratory relief is not appropriate to this particular proceeding, and should not be applied hereto.

The Court will attempt to state the position of the Complainants insofar as it presents a legal issue to be resolved herein. The Complainant adopts the position that title to lands under tidal waters vested in the King of England, for the benefit of the nations, passed to the Colonies under the Royal Charters granted therefor, in trust for the communities to be established, and upon the American Revolution, passed to the original States to be held by the officials thereof in trust for the people within the boundaries of the respective States, subject only to the rights surrendered by the Constitution of the United States to the Federal Government for the regulation of navigation. The trust which she envisioned is one which covers the entire *jus publicum* and vests

in the trustee an irrevocable and inalienable title to such property. In support of her position in regard to such a trust, she narrowly construes the first portion of Article 6 of the Declaration of Rights of the Constitution of Maryland, of 1867, which reads:

"Art. 6. That all persons invested with the Legislative or Executive powers of Government are the Trustees of the Public, and, as such, accountable for their conduct: ..."

She is further contending that such being the alleged common law of England, the General Assembly of Maryland, or apparently any Provincial legislature, is not, and never has been, empowered or authorized to change or modify that common law. As authority for that provision, she cites a portion of the content of Article 5 of the Declaration of Rights of the Constitution of Maryland, of 1867, the portion which she cites being as follows:

"Art. 5. That the Inhabitants of Maryland are entitled to the Common Law of England, ...".

At this point, perhaps it would be well that the Court quote the remainder of Article 5 of the Declaration of Rights, with the emphasis by underlining being supplied by the Court:

"Art. 5. That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English Statutes as existed on the Fourth day of July, 1776; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, 1867; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, an amendment or repeal by, the Legislature, of this State. And, the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by His Majesty Charles I to Caecilius Calvert, Baron of Baltimore."

There is no substantial difference between that portion of the 1867 Constitution of Maryland and paragraph 3 of the Declaration of Rights of the First Constitution of Maryland, as reported by Kilty, Volume 1, The Laws of Maryland, 1799 Edition. It reads as follows:

"III. That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by jury according to the course of that law, and to the benefit of such of the English statutes as existed at the time of their first emigration and which by experience have been found applicable to their local and other circumstances, and of such others as have been since made in England or Great-Britain, and have been introduced, used and practiced by the Courts of Law or Equity; and also to all acts of assembly in force on the first of June, 1774, except such as may have since expired, or have been, or may be altered by acts of convention, or this declaration of rights; subject nevertheless to the revision of, and amendment or repeal by, the Legislature of this State: and also the Inhabitants of Maryland are also entitled to all property derived to them from or under the charter granted by His Majesty Charles I to Caecilius Calvert, Baron of Baltimore."

If, as Counsel for the Complainant has stated in his Supplementary Memorandum, the Court was impatient at the Hearing with the persistent argument of Counsel with regard to the elements of the Common Law doctrine, perhaps it was because of the clear exception in the Declaration of Rights as hereinbefore set forth, and the almost incontestable legal understanding that the Legislature of Maryland is at liberty, and in the conscientious performance of its duties, must, from time to time, change the Common Law through statutory enactments in order to meet the changing conditions of time and history. Lutz vs. State 167 Md. 12, Heath vs. State, 198 Md. 455, Goldenberg vs. Federal Finance, 150 Md. 298, 5 M.L.E. "Common Law", Section 3. The adoption of any proposition that would abrogate, nullify and destroy the great body of law in Maryland, including enactments of the General Assembly, except so much thereof as interpreted and applied the Common Law of England prior to 1776 and the treatment of subjects not contemplated by that common law, is so illogical, unreasonable, and disastrous in its consequences as to be almost incomprehensible. The Court supposes that this is the reason why the point had not been more frequently pressed upon the Courts of this State in the past.

The Court is indebted, however, to Counsel for the Complainant for urging upon the Court the controlling nature of the opinion of the Supreme Court of the United States in Shively vs. Bowlby,

14 Sup. Ct. 548, 152 U. S. 1. The Court willingly and delightedly adopts the decision therein to be determinative of the issues presented by the Complainant for resolution in this proceeding. Unfortunately, Counsel for the Complainant has misread the case, and has appropriated wording from that case, out of context, to attempt to support the position of the Complainant herein.

That case establishes the proposition that, consistent with the Common Law of England, the individual States inherited the sovereignty over lands under navigable waters within the State, and granted unto them control and regulation of riparian rights, which the States were free to alienate according to the constitution and statutes of the respective States. In a most helpful and extensive treatment of the entire subject matter of riparian rights as they existed within the original thirteen states, and as, by virtue of that opinion, extended to the new states admitted into the Union thereafter, the Supreme Court, in *Shively vs. Bowlby*, has furnished a source of history of the treatment of riparian rights of enormous magnitude, and through its study, one is oriented to the broad spectrum, and range of treatment, of the subject by the individual States. This concept is fundamental if one is to now attempt to define and understand riparian rights within the United States. Available treatises, encyclopedic compendiums, and conclusions based upon summaries of annotations must all be read and considered in the light of the cardinal principle that the decisions of the individual states are based upon the law as it had been established within the individual states, and unless the law in force in the State in which the appellate decision has been rendered is identical with that in Maryland, the decision of the foreign jurisdiction, or the interpretation of a federal tribunal based upon the law of that foreign jurisdiction, is neither persuasive nor controlling.

If the strict trust theory proposed by the Complainant is the law in other jurisdictions, it is certainly not the law in Maryland. Without belaboring the issue with the repetition of authorities recently enumerated and discussed by this Court in No. 8935 Chancery, the Court would merely observe that, beginning with the Acts of 1745 and continuing through the Acts of 1970, the Legislature of Maryland has recognized the existence of certain riparian rights in private land owners. A long line of judicial decisions of the Court of Appeals of Maryland and Federal Courts interpreting Maryland law, have protected, enforced, interpreted and arbitrated these rights, beginning, at least, in 1815, with *The Wharf Case*, reported in 3 Bland at page 361, and continuing through *Causey vs. Gray*, in 1968, reported in 250 Md. at page 380, and through November 12, 1969, in *Western Contracting Corporation vs. Titter*, reported in 255 Md. at page 581.

The most specific pronouncement of the General Assembly of Maryland, however, upon the narrow issue sought by the Complainant to be raised against The Board of Public Works of Maryland is contained in Section 15 of Article 78A of The Annotated Code of Maryland. Without quoting that lengthy section in full in this Opinion, since 1945, The Board of Public Works of Maryland has been granted specifically the following power:

"Any real or personal property of the State of Maryland or of any Board, Commission, Department or Agency thereof, and any legal or equitable rights, interests, privileges or easements, in, to, or over the same, may be sold, leased, transferred, exchanged, granted or otherwise disposed of to any person, firm, corporation, or to the United States, or any agency thereof, or to any Board, Commission, Department or other agency of the State of Maryland for a consideration adequate in the opinion of the Board of Public Works, or to any county or municipality in the State subject to such conditions as The Board of Public Works may impose As used herein, the term 'real or personal property or any legal or equitable rights, interests, privileges or easements in, to, or over the same' shall include the inland waters of the State and land under said waters, as well as the land underneath the Atlantic Ocean for a distance of three miles from the low watermark of the coast of the State of Maryland bordering on said ocean, and the waters above said land"

The language which Counsel for the Complainant has selected from Shively vs. Bowlby with regard to the imposition of a trust does not apply to the type of trust which the Complainant espouses. The factual situation in Shively vs. Bowlby presented the issue as to whether or not a purported grant from the United States of America, while the area was a territory under the jurisdiction of the Federal Government, took precedence over a grant by the State of Oregon for the same land. The Court determined that the United States had no power to make such a grant because the Federal Government held the land in trust pending the formation of the new State. If one will read the last ten paragraphs of that Opinion, the thrust of the entire opinion will become most evident. The type of trust referred to therein bears no resemblance to the type of trust here urged upon the Court.

The pleadings, memoranda, and arguments in this case have been filled with references to various possible disastrous consequences by the adoption of the position of one party or the other. The Court refuses to speculate, and does not base this Opinion upon any unproven allegations, either favorable or unfavorable to the Complainant, but, if one had the time, it might be an interesting mental exercise to conceive of replacing the shorelines of The State of Maryland to their composition and contour, and in all their pristine beauty, of the year 1634. Such would be the logical, if unreasonable, result should the theory of the Complainant be adopted, and the requested "Mandatory Injunction" issued by this Court.

Adapting, as she has, the theory of her cause of action, the Court can see no reasonably possible manner in which the Bill of Complaint can be amended to avoid its basic infirmity, nor any need for any further delay in granting an opportunity for such an amendment.

Having reached this decision in the matter, it becomes unnecessary to consider the standing of the Complainant to sue.

It is, therefore, this 31st day of August, 1970, by the Circuit Court for Worcester County, Maryland, ORDERED that:

1. The Petition to Intervene as Plaintiffs filed by the "North American Habitat Preservation Society" and R. Doyle Grabarck, President, and Individually, on January 26, 1970, is DENIED;
2. The Motion Ne Recipiatur filed by Defendant James B. Caine, Inc., to the said Petition to Intervene as Plaintiffs, on February 27, 1970, is DENIED;
3. The Motion Ne Recipiatur filed by Complainant to the said Motion Ne Recipiatur filed by the Defendant James B. Caine, Inc., on March 11, 1970, is DENIED;
4. The Motion Raising Preliminary Objection filed by the Defendant James B. Caine, Inc., on October 21, 1969, is DENIED;
5. The Motion Ne Recipiatur filed by Complainant to Demurrer of the Defendant Maryland Marine Properties, Inc., on November 7, 1969, is DENIED;
6. The Demurrer of Defendant Maryland Marine Properties, Inc., to the Bill of Complaint, filed on October 20, 1969, is SUSTAINED, without leave to the Complainant to amend;
7. The Demurrer of Defendant Board of Public Works to the Bill of Complaint, filed on October 21, 1969, is SUSTAINED, without leave to the Complainant to amend; and
8. The "Motion of Complainant for Summary Judgment Upon Same Issues" filed by the Complainant on May 11, 1970, being more in the nature of a Demand for Admission of Facts, (which would have been a more appropriate Pleading) is GRANTED, the facts therein having been

conceded in the absence of any response thereto by
the Defendants; and

9. The Complainant shall pay the costs of this proceeding.


DANIEL T. PRETTYMAN
Judge

TRUE COPY, TEST: *Frank W. Blane* **CLERK**

ELINOR H. KERPelman,

Complainant

v.

MARVIN MANDEL, et al.,

Defendants

IN THE
CIRCUIT COURT FOR
WORCESTER COUNTY
-Equity No. 8934

1 1 1 1 1
PETITION TO
INTERVENE AS PLAINTIFFS

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Now comes the North American Habitat Preservation Society, and R. Doyle Grabarck, its President, suing however, Individually, by Leonard J. Kerpelman, their Solicitor, and respectfully represent:

1. The petitioning organization is a corporation of the Commonwealth of Pennsylvania, organized under the non-profit laws of that state on March 24, 1969; Petitioner Grabarck is a Maryland resident, and a member of said Society; the address of each is Box 869, Adelphi, Maryland 20783.
2. The said Society has a Maryland membership of Maryland residents and citizens, of 4,335 active members, each of whom is personally dedicated to the purposes and goals of the said Society. The great majority, over 60%, of said members are young people under the age of 30, but from all walks of life: working people, professional people, students and academicians; and every race, color, creed, economic circumstance and social outlook, it may fairly be said, are comprised among its membership.
3. The goals of the organization, and its purposes, substantially as set forth in its Charter, are the following:
 - A. To financially support meaningful, creative litigation, the purpose of which is to preserve the nation's natural resource and environmental heritage.
 - B. To conduct scientific research on pollutants of air and water, and to develop methods by which the waste disposal problem of cities and suburbs might be made economically useful instead of an economic drain.

C. To work in conjunction with government, private business, and institutions to set up scientific advisory boards which can offer independent advice to these agencies, and to conduct unbiased research for industry and government, the results of which would condone, condemn, or offer alternatives to their own plans.

D. To act as a public educator in developing environmental science units for schools, and in developing awareness programs for all citizens.

4. Many members of the said Society, at least 2,000, are Maryland taxpayers (those who pay sales tax, income tax, or property tax), and are thereby similarly situated to the Plaintiff, Elinor H. Kerpelman, as far as their property interest and social interest in the purposes of her suit are concerned.

5. The allegations and purposes set forth in the complaint of Elinor H. Kerpelman, Complainant, are interests and allegations which would apply equally to every member of the North American Habitat Preservation Society; and particularly the prayers for relief are desired vigorously to be granted, by each member of the Society, and by the Society.

The petitioners believe that by applying to intervene in the within suit, they illustrate to the court a small proportion of those substantial numbers of citizens who have a direct interest, and a serious stake, in the outcome of the within suit; they believe that these interests can be better protected, and more fully elucidated for the court, as well the issues in the case, should they be allowed to intervene as plaintiffs.

6. (Intervention of Right.) Further, the Individual Petitioner herein, Grabarck, and the Society, believe, and therefore allege, that their interest in the subject matter of the suit, namely, ownership of wetlands, is or may be inadequate, in that Plaintiff Kerpelman's interest as a citizen is or may be

directed toward property, ecological, and monetary considerations, while the Petitioners have supervening interests in their natural resource and environmental heritage, anti-pollution, and governmental cooperation factors involved in the suit, all of which, they contend specifically are protected by the Fourteenth, Fifth, Ninth and Tenth Amendments to the United States Constitution; the Petitioners will be unqualifiedly bound by a judgment in the action should the fee title to the lands in question be determined to be in the developers referred to in the suit, or in the State of Maryland in some non-trust capacity, or in the Defendant Board of Public Works; likewise the Petitioners are so situated, as users and beneficiaries of said wetlands as to be unqualifiedly deprived of the benefits and uses mentioned in the Bill of Complaint to flow from said lands as marshlands and wetlands, but which will be cut off by filling or disposal of said lands, including, but not exclusively, destruction forever of the Petitioners' natural resource and environmental heritage.

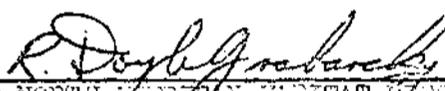
7. (Intervention by Permission of the Court.) The Petitioners claim to ownership of the lands in question, and to relief, has questions of law in common with the claims of Complainant Kerpelman; in addition to the matters alleged in paragraph 6 hereof.
8. (Class Action.) Many persons, including the individual members of the Society, and organizations are similarly situated to the Petitioners, by virtue of their interest in the subject matter of the suit over and above the interest of Complainant Kerpelman, and they constitute a class: young persons, residents, members of conservation and recreation organizations, too numerous to allow of practical joinder, but the claims of Petitioners are representative of the claims of all of this substantial class, who may not be entirely represented by the claims of the Plaintiff, and the Petitioners will fairly and

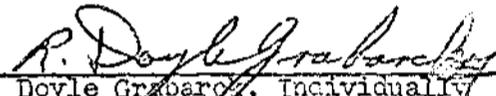
adequately represent the interests of all of these.

WHEREFORE, the Petitioners pray that they may be permitted to intervene as Plaintiffs in the within case.

AND, AS IN DUTY BOUND, ETCETERA.


Leonard J. Kerpelman,
Attorney for Petitioners
The North American Habitat Preservation Society, and R. Doyle Grabarck

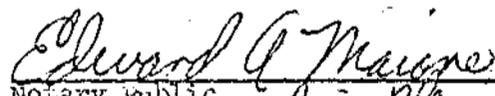

THE NORTH AMERICAN HABITAT PRESERVATION SOCIETY, by R. Doyle Grabarck, President
Box 869
Adelphi, Maryland 20783


R. Doyle Grabarck, Individually
Box 869
Adelphi, Maryland 20783

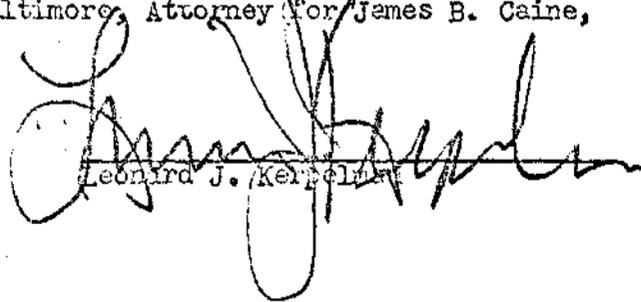
AFFIDAVIT

CITY OF
STATE OF MARYLAND, to-wit:

Before me, the subscriber, a notary public in and for the County and State aforesaid, personally appeared R. Doyle Grabarck, both Individually, and as President of the North American Habitat Preservation Society, this 20 day of January, 1970, and made oath in due form of law that the matters and facts set forth in the foregoing Petition are true to the best of his knowledge and belief, and that the said Petition is the Petition of himself Individually, and of the said North American Habitat Preservation Society.


Notary Public
Com. exp. July 1, 1970
9107 Risp Rd
Adelphi, Md

I HEREBY CERTIFY THAT a copy of the foregoing was mailed this day of January, 1970, to Thomas B. Perkins, III, Esq., Mercantile Trust Building, Attorney for Maryland Marine Properties, Inc.; Francis B. Burch, Esq., Attorney General of Maryland, 1201 One Charles Center, Baltimore; and Joseph H. Young, Esq., 901 First National Bank Bldg., Baltimore, Attorney for James B. Caine, Inc.


Leonard J. Kerpelman

ELINOR H. KERPELMAN,

Complainant

v.

MARVIN MANDEL, et al.,

Defendants

IN THE

CIRCUIT COURT OF

WORCESTER COUNTY

Equity No. 8934

ORDER TO SHOW CAUSE

Upon the foregoing Petition and Affidavit, it is this 26th day of January, 1970, by the Circuit Court for Worcester County, ORDERED, That the Defendants show cause, on or before the 2nd day of March 1970, if any they may have, why the Petition to Intervene of the North American Habitat Preservation Society, and of R. Doyle Grabarck, Individually, should not be granted.

PROVIDED, that a copy of the foregoing Petition and Affidavit, and of this Order to Show Cause, be served on the Defendants, and each of them, by mailing a copy thereof to their counsel on or before the 16th day of February 1970.

[Signature]
Judge

TRUE COPY, TRUSTED: [Signature] CLERK

[Faint stamp]

CERTIFIED COPY

NO. 8934 CHANCERY

ELINOR H. KERPELIMAN,
COMPLAINANT
VS
BOARD OF PUBLIC WORKS OF
MARYLAND, ET AL

DOCKET ENTRIES

OFFICE OF
FRANK W. HALES
CLERK OF CIRCUIT COURT
FOR WORCESTER COUNTY
SNOW HILL, MD.

1970, May 5. Plaintiff's Memorandum of Law, Table of Contents, and Certificate of Service thereon filed.

1970, May 6. Memorandum of Law of Defendant James B. Caine, Inc., and Certificate of Service thereon filed.

1970, May 11. Motion for summary judgment upon some Issues, Affidavit and Certificate of Service thereon, filed.

1970, May 11. Judge Daniel T. Prettyman on the Bench. Dave Dawson reporting.

1970, May 11. Leonard J. Kerpelman, Lee W. Bolte, Jon Oster, Raymond D. Coates, Thoman P. Perkins, III, Esqs. in Court.

1970, May 11. Hearing and Argument had on all preliminary Demurrers, Motions and Petitions filed as of this date. Rulings held sub-curia.

1970, May 11. The Motion for summary judgment upon some issues filed May 11, 1970, at 9:30 A.M., is reserved for future Argument and disposition.

1970, May 15. Answer to Memorandum of Law of Defendant James B. Caine, Inc., and Certificate of Service thereon filed.

1970, June 17. Supplementary Plaintiff's Memorandum of Law, and Certificate of Service filed.

1970, Aug. 31. Ordered that:-

Att'y. - \$10.00) Waived
 Clerk - 10.00) Pd. 9/30/69
 Clk. Add.- 5.00) Pd. 10/26/70
 Sheriff - 8.00) Pd. 9/30/69
 Sheriff add'l 4.00) Pd. 9/30/69
 Balto. City. →
 Wor. Co. →
 Clk. Add.- 90.00) Pd. 10/26/70
 Record - 25.00) Pd. 10/26/70
 (Record to Supreme Court
 of U.S. - 25.00) Pd. 8/5/71

8934

1. The Petition to Intervene as Plaintiffs filed by the "North American Habitat Preservation Society and R. Doyle Grabarck, President and Individually, on January 26, 1970, is DENIED;
2. The Motion Ne Recipiatur filed by Defendant James B. Caine, Inc., to the said Petition to Intervene as Plaintiffs, on February 27, 1970, is DENIED;
3. The Motion Ne Recipiatur filed by Complainant to the said Motion Ne Recipiatur filed by the Defendant, James B. Caine, Inc., on March 11, 1970, is DENIED;
4. The Motion Raising Preliminary Objection filed by the Defendant James B. Caine, Inc., on October 21, 1969, is DENIED;
5. The Motion Ne Recipiatur filed by Complainant to Demurrer of the Defendant Maryland Marine Properties, Inc., on November 7, 1969, is DENIED;
6. The Demurrer of Defendant Maryland Marine Properties, Inc., to the Bill of Complaint, filed on October 20, 1969, is SUSTAINED, without leave to the Complainant to amend;
7. The Demurrer of Defendant Board of Public Works to the Bill of Complaint, filed on October 21, 1969, is SUSTAINED, without leave to the Complainant to amend;
8. The "Motion of Complainant for summary judgment upon same Issues" filed by the Complainant on May 11,

Defendant's costs.
 Att'y. -\$10.00) Pd. 10/26/70

Receipt #98643
 Receipt #82106 & 91797

8934

1970, being more in the nature of a Demand for Admission of Facts, (which would have been a more appropriate Pleading) is GRANTED, the facts therein having been conceded in the absence of any response thereto by the Defendants; and

9. The Complainant shall pay the costs of this proceeding, per Opinion and Order of Court filed. Copies of the Opinion and Order of Court mailed to Leonard J. Kerpelman, Esq., Jon F. Oster, Esq., Asst. Attorney General, Richard M. Pollitt, Esq., Lee W. Bolte, Esq., Raymond D. Coates, Esq., and to Thomas P. Perkins, III, Esq.

1970, Sept. 2. Demurrer of Defendant James B. Caine, Inc., and Certificate of service filed.

1970, Sept. 2. Answer to Petition to Intervene and Certificate of Service filed.

1970, Sept. 22. ORDERED that, for the reasons assigned in the Opinion and Order of this Court filed on August 31, 1970, which said Opinion is specifically incorporated herein, by reference thereto, as though fully set forth herein, the "Petition To Intervene as Plaintiffs" filed by the "North American Habitat Preservation Society" and R. Doyle Grabarck, on January 26, 1970, be, and the same is hereby DENIED, and the Demurrer of James B. Caine, Inc., be, and the same is hereby, SUSTAINED, without leave to the Complainant to amend, per Order of Court, filed. Copies of Order of Court mailed to Leonard J. Kerpelman, Esq., Jon F. Oster, Esq., Asst. Attorney General, Richard M. Pollitt, Esq., Lee W. Bolte, Esq., Raymond D. Coates, Esq., and Thomas P. Perkins, III, Esq.

1970, Sept. 29. Order for Appeal and Certificate of Service filed.

1970, Oct. 1. Photo copy of Amended Statement of costs dated October 1, 1970, mailed to Leonard J. Kerpelman, Esq., Hon. Francis B. Burch, Jon. F. Oster, Esq., Richard M. Pollitt, Esq., Lee W. Bolte, Esq., Raymond D. Coates, Esq., Thomas P. Perkins, III, Esq., and Robert A. Shelton, Esq., Copy of Amended Statement of costs filed.

1970, Oct. 5. Letter dated October 1, 1970, from Leonard J. Kerpelman, Esq., Baltimore, Maryland, to David Dawson, Court Reporter, filed.

1970, Oct. 7. Letter from Leonard J. Kerpelman, Esq., to Clerk, Worcester County Court, reply of Clerk at bottom of letter, copy of statement of costs dated Sept. 2, 1970, and copy of Amended Statement of costs dated October 1, 1970, filed. Copy of said letter, reply and statements of costs mailed to Leonard J. Kerpelman, Esq.

8934

<p>LJK</p> <p>8934</p> <p>FBB JFO RMP</p> <p>S&B LWB</p> <p>RDC TPP,III RAS</p>	<p>Elinor H. Kerpelman 2403 W. Rogers Avenue Baltimore, Maryland 21209, Complainant,</p> <p>Vs.</p> <p>Non. Marvin Mandel, Governor, Louis L. Goldstein, Comptroller of the Treasury, and John Leutkemeyer, Treasurer; constituting the Board of Public Works of Maryland, State Office Building, 301 Preston Street, Baltimore, 1, Maryland. (Serve one copy on the Governor at above address, and one on Francis B. Burch, Esq., Attorney General of Maryland, one Charles Center, Baltimore, 2, Maryland) James B. Caine, Inc., a Maryland corporation (Serve on: James B. Caine, Resident Agent, 53rd & Ocean Highway, Ocean City, Worcester Co., Maryland), and Maryland Marine Properties, Inc., a Maryland corporation, (Serve on: Raymond D. Coates, Atlantic Hotel Building, Ocean City, Worcester Co., Maryland), Defendants.</p>	<p>1969, Sept. 30. Bill of Complaint for a Mandatory Injunction, and for Declaratory Relief and Interrogatories to the Defendant Board, filed.</p> <p>1969, Sept. 30. Subpoena with copies issued, together with copies of Bill of Complaint for a Mandatory Injunction, and for Declaratory Relief and Interrogatories to the Defendant Board attached and mailed to the Sheriff of Baltimore City and delivered to the Sheriff of Worcester County for service.</p> <p>"Summoned James B. Caine, Inc., by service upon James B. Caine and Maryland Marine Properties, Inc., by service upon Raymond D. Coates severally by leaving with each of them a copy of the Writ, together with Bill of Complaint for Mandatory Injunction and a Declaratory Relief Interrogatories to the Defendant Board attached this 30th day of September, 1969. So ans." R. Calvin Hall, Sheriff, By: James N. Jarman, Deputy Sheriff.</p> <p>"Non Est as to Hon. Marvin Mandel, Governor", J. Mufken, Frank J. Pelz, Sheriff.</p> <p>"Copy of the Process with a copy of Bill of Complaint served on Francis B. Burch, Esq., Attorney General of Maryland at One Charles Center, at 2:05 P.M. on the 1st day of October, 1969, in the presence of Sol Damoff", Frank J. Pelz, Sheriff.</p> <p>1969, Oct. 9. Second Subpoena with copy issued, together with copy of Bill of Complaint for a Mandatory Injunction and for Declaratory Relief and Interrogatories to the Defendant Board attached and mailed to the Sheriff of Baltimore City for service on the Governor.</p> <p>1969, Oct. 20. Demurrer of Defendant, Maryland Marine Properties, Inc., and Certificate of Service thereon, filed.</p> <p>1969, Oct. 20. Memorandum of Law of Defendant, Maryland Marine Properties, Inc., in Support of Demurrer, filed.</p> <p>1969, Oct. 21. Demurrer of Defendant Board of Public Works and Certificate of Service thereon, filed.</p> <p>1969, Oct. 21. Motion Raising Preliminary Objection, Request for Hearing and Certificate of Service thereon, filed.</p> <p>"Summoned Honorable Marvin Mandel, Governor, and a copy of the process with a copy of the Bill of Complaint left with the defendant at 301 W. Preston St., at 12:30 P.M. on the 27 day of October, 1969 in the presence of John Nuller, III", Frank J. Pelz, Sheriff.</p> <p>1969, Nov. 6. Reply to "Memorandum of Law of Maryland Marine in Support of Demurrer" and certificate of service thereon, filed.</p> <p>1969, Nov. 7. Motion Ne Recipiatur to Demurrer of Maryland Marine, Memorandum of Authorities and Certificate of Service thereon, filed.</p>
<p>8934</p> <p>8934</p> <p>8934</p>	<p>(continued from above)</p>	<p>1969, Nov. 17. Answer to Motion Raising Preliminary Objection, Memorandum of Authority and Certificate of Service thereon, filed.</p> <p>1970, Jan. 26. Petition to Intervene as Plaintiffs, Affidavit, and Certificate of Service thereon, filed.</p> <p>1970, Jan. 26. Unsigned Order to Show Cause, filed.</p> <p>1970, Jan. 26. Order to Show Cause filed. Copies of Petition, Affidavit and Show Cause Order mailed to Hon. Marvin Mandel, the Governor of the State of Maryland, Louis L. Goldstein, Comptroller of Treasury, John Leutkemeyer, Treasurer, Board of Public Works of Maryland, James B. Caine, Inc., Ocean City, Maryland, and Maryland Marine Properties, Inc., Ocean City, Maryland.</p> <p>1970, Feb. 24. Answer of Defendant, Maryland Marine Properties, Inc., to Petition to Intervene and Certificate of Service thereon, filed.</p> <p>1970, Feb. 27. Motion Ne Recipiatur as to Petition to Intervene as Plaintiffs and Certificate of Service thereon filed.</p> <p>1970, March 11. Motion Ne Recipiatur, Memorandum of Rules in Authority and Certificate of Service thereon filed. Copy of same delivered to Lee W. Bolte, Esq.</p> <p>1970, March 16. Copy of Motion Ne Recipiatur, Memorandum of Rules in Authority, and Amended Certificate of Service thereon filed.</p> <p>1970, April 8. Letters written to: Hon. F.B. Burch and Jon F. Oster, Esq., L. W. Bolte, Esq., R. A. Shelton and T. P. Perkins, III, Esqs., R. D. Coates, Esq., R. M. Pollitt, Esq., and Leonard J. Kerpel- man, Esq., setting case for Argument on all Demurrers, Motions, Petitions &c., filed as of the date of this notice, on Monday, May 11, 1970, at 10:00 A.M., per copies of letters filed.</p> <p>1970, April 13. Receipt of notification of assignment date from Robert A. Shelton and Thomas P. Perkins, III, Esqs., filed.</p> <p>1970, April 13. Receipt of notification of assignment date from Lee W. Bolte, Esq., filed.</p> <p>1970, April 13. Receipt of notification of assignment date from Raymond D. Coates, Esq., filed.</p> <p>1970, April 24. Receipt of notification of assignment date from Leonard J. Kerpelman, Esq., filed.</p> <p>1970, April 24. Letter from Leonard J. Kerpelman, Esq., to Frank W. Hales, Clerk, filed.</p> <p>1970, April 24. Copy of letter from Richard H. Outten, Assignment Clerk to Leonard J. Kerpelman, Esq., filed.</p>

CHANCERY DOCKET

#8934 (continued)

#8934 (continued)

- 1970, Oct. 8. Photo copy of Notice advising attorneys of record the case is ready for inspection and transmission to the Court of Appeals, mailed to Leonard J. Kerpelman, Esq.; Hon. Francis B. Burch; Hon. Jon F. Oster; Richard M. Pollitt, Esq.; Lee W. Bolte, Esq.; Raymond D. Coates, Esq.; Thomas P. Perkins, III, Esq.; and Robert A. Shelton, Esq., per original notice, filed.
- 1970, Oct. 26. Order to enter an appeal to the Court of Appeals of Maryland from the judgment of the Court dated Sept. 22, 1970, per Order filed.
- 1970, Oct. 27. Original papers of record, together with certified copy of docket entries and statement of costs transmitted to the Court of Appeals of Maryland, Annapolis, Maryland, 21404; sent certified mail, return receipt requested.
- 1970, Oct. 29. Return receipt filed.
- 1971, May 13. Transcript of record returned from Court of Appeals of Maryland and filed.
- 1971, May 13. (October 30, 1970: Motion to Dismiss appeal filed by James B. Caine, Inc., one of appellees.)
- 1971, May 13. (November 16, 1970: Motion to dismiss granted and that appeal dismissed.)
- 1971, May 13. (April 12, 1971: Order of August 31, 1970, affirmed the appellant to pay the costs, Opinion by Barnes, J.), per Mandate, filed.
- 1971, July 22. Letter dated July 19, 1971, from Leonard J. Kerpelman, Esq., Baltimore, Maryland, to Clerk Circuit Court for Worcester County, filed.
- 8934 1971, July 23. Copy of letter from Frank W. Hales, Clerk, to Leonard J. Kerpelman, Esq., Baltimore, Maryland, filed.
- 1971, July 23. Statement of costs mailed to Leonard J. Kerpelman, Esq., Baltimore, Maryland, per copy filed.
- 1971, Aug. 9. Letter to Leonard J. Kerpelman, Esq., from Frank W. Hales, Clerk, advising case is being forwarded to the Supreme Court of the United States, Supreme Court Building, Washington, D.C. Photo copy of letter filed. Photo copy of letter mailed to the attorneys of record, namely: Honorable Francis B. Burch, Attorney General; Honorable Jon F. Oster, Assistant Attorney General; Richard M. Pollitt, Esq.; Lee W. Bolte, Esq.; Raymond D. Coates, Esq.; Thomas P. Perkins, III, Esq., and Robert A. Shelton, Esq.
- 1971, Aug. 9. Original papers of record, together with certified copy of docket entries transmitted to the Clerk of the Supreme Court of the United States, Supreme Court Building, Washington, D.C.; sent certified mail, return receipt requested.

STATE OF MARYLAND, WORCESTER COUNTY, TO WIT:

I, Frank W. Hales, Clerk of the Circuit Court for Worcester County, State of Maryland, hereby certify that the foregoing is a true and correct copy of the docket entries in case No. 8934 Chancery, in the Circuit Court for Worcester County; same being the case of Elinor H. Kerpelman, Complainant, Vs. Hon. Marvin Mandel, Governor, Louis, L. Goldstein, Comptroller of the Treasury, and John Leutkemeyer, Treasurer, Constituting the Board of Public Works of Maryland, State Office Building, 301 Preston Street, Baltimore 1, Maryland. (Serve one copy on the Governor at above address, and one on Francis B. Burch, Esq., Attorney General of Maryland, One Charles Center, Baltimore 2, Maryland), James B. Caine, Inc., a Maryland corporation, (Serve on: James B. Caine, Resident Agent, 53rd & Ocean Highway, Ocean City, Worcester Co., Maryland) and Maryland Marine Properties, Inc., a Maryland Corporation, (Serve on: Raymond D. Coates, Atlantic Hotel Building, Ocean City, Worcester Co., Maryland), Defendants.



IN TESTIMONY WHEREOF, I hereunto set my hand and affix the Seal of the Circuit Court for Worcester County, State of Maryland, this 9th day of August, A.D. 1971.

Frank W. Hales
Clerk of the Circuit Court for
Worcester County, Maryland.

CERTIFIED COPY

NO. 8934 CHANCERY

ELINOR H. KERPELMAN
COMPLAINANT

VS

HON. MARVIN MANDEL,
GOVERNOR, AL,
CONSTITUTING THE BOARD OF
PUBLIC WORKS OF MARYLAND,
JAMES B. CAINE, INC.,
AND
MARYLAND MARINE PROPERTIES,
INC., DEFENDANTS.

DOCKET ENTRIES

OFFICE OF
FRANK W. HALES
CLERK OF CIRCUIT COURT
FOR WORCESTER COUNTY
SNOW HILL, MD.

RECEIVED
987
STATE LAW DEPT.

<p>LJK</p> <p>8934</p> <p>FBB</p> <p>JFO</p> <p>RMP</p> <p>S&B</p> <p>LWB</p> <p>RDC</p> <p>TPP, III</p> <p>RAS</p>	<p>Elinor H. Kerpelman 2403 W. Rogers Avenue Baltimore, Maryland 21209, Complainant,</p> <p>Vs.</p> <p>Non. Marvin Mandel, Governor, Louis L. Goldstein, Comptroller of the Treasury, and John Leutkemeyer, Treasurer; constituting the Board of Public Works of Maryland, State Office Building, 301 Preston Street, Baltimore, 1, Maryland. (Serve one copy on the Governor at above address, and one on Francis B. Burch, Esq., Attorney General of Maryland, one Charles Center, Baltimore, 2, Maryland) James B. Caine, Inc., a Maryland corporation (Serve on: James B. Caine, Resident Agent, 53rd & Ocean Highway, Ocean City, Worcester Co., Maryland), and Maryland Marine Properties, Inc., a Maryland corporation, (Serve on: Raymond D. Coates, Atlantic Hotel Building, Ocean City, Worcester Co., Maryland), Defendants.</p>	<p>1969, Sept. 30. Bill of Complaint for a Mandatory Injunction, and for Declaratory Relief and Interrogatories to the Defendant Board, filed.</p> <p>1969, Sept. 30. Subpoena with copies issued, together with copies of Bill of Complaint for a Mandatory Injunction, and for Declaratory Relief and Interrogatories to the Defendant Board attached and mailed to the Sheriff of Baltimore City and delivered to the Sheriff of Worcester County for service.</p> <p>"Summoned James B. Caine, Inc., by service upon James B. Caine and Maryland Marine Properties, Inc., by service upon Raymond D. Coates severally by leaving with each of them a copy of the Writ, together with Bill of Complaint for Mandatory Injunction and a Declaratory Relief Interrogatories to the Defendant Board attached this 30th day of September, 1969. So ans." R. Calvin Hall, Sheriff, By: James N. Jarman, Deputy Sheriff.</p> <p>"Non Est as to Hon. Marvin Mandel, Governor", J. Mufken, Frank J. Pelz, Sheriff.</p> <p>"Copy of the Process with a copy of Bill of Complaint served on Francis B. Burch, Esq., Attorney General of Maryland at One Charles Center, at 2:05 P.M. on the 1st day of October, 1969, in the presence of Sol Damoff", Frank J. Pelz, Sheriff.</p> <p>1969, Oct. 9. Second Subpoena with copy issued, together with copy of Bill of Complaint for a Mandatory Injunction and for Declaratory Relief and Interrogatories to the Defendant Board attached and mailed to the Sheriff of Baltimore City for service on the Governor.</p> <p>1969, Oct. 20. Demurrer of Defendant, Maryland Marine Properties, Inc., and Certificate of Service thereon, filed.</p> <p>1969, Oct. 20. Memorandum of Law of Defendant, Maryland Marine Properties, Inc., in Support of Demurrer, filed.</p> <p>1969, Oct. 21. Demurrer of Defendant Board of Public Works and Certificate of Service thereon, filed.</p> <p>1969, Oct. 21. Motion Raising Preliminary Objection, Request for Hearing and Certificate of Service thereon, filed.</p> <p>"Summoned Honorable Marvin Mandel, Governor, and a copy of the process with a copy of the Bill of Complaint left with the defendant at 301 W. Preston St., at 12:30 P.M. on the 27 day of October, 1969 in the presence of John Nuller, III", Frank J. Pelz, Sheriff.</p> <p>1969, Nov. 6. Reply to "Memorandum of Law of Maryland Marine in Support of Demurrer" and certificate of service thereon, filed.</p> <p>1969, Nov. 7. Motion Ne Recipiatur to Demurrer of Maryland Marine, Memorandum of Authorities and Certificate of Service thereon, filed.</p>
<p>8934</p> <p>8934</p> <p>8934</p>	<p>(continued from above)</p>	<p>1969, Nov. 17. Answer to Motion Raising Preliminary Objection, Memorandum of Authority and Certificate of Service thereon, filed.</p> <p>1970, Jan. 26. Petition to Intervene as Plaintiffs, Affidavit, and Certificate of Service thereon, filed.</p> <p>1970, Jan. 26. Unsigned Order to Show Cause, filed.</p> <p>1970, Jan. 26. Order to Show Cause filed. Copies of Petition, Affidavit and Show Cause Order mailed to Hon. Marvin Mandel, the Governor of the State of Maryland, Louis L. Goldstein, Comptroller of Treasury, John Leutkemeyer, Treasurer, Board of Public Works of Maryland, James B. Caine, Inc., Ocean City, Maryland, and Maryland Marine Properties, Inc., Ocean City, Maryland.</p> <p>1970, Feb. 24. Answer of Defendant, Maryland Marine Properties, Inc., to Petition to Intervene and Certificate of Service thereon, filed.</p> <p>1970, Feb. 27. Motion Ne Recipiatur as to Petition to Intervene as Plaintiffs and Certificate of Service thereon filed.</p> <p>1970, March 11. Motion Ne Recipiatur, Memorandum of Rules in Authority and Certificate of Service thereon filed. Copy of same delivered to Lee W. Bolte, Esq.</p> <p>1970, March 16. Copy of Motion Ne Recipiatur, Memorandum of Rules in Authority, and Amended Certificate of Service thereon filed.</p> <p>1970, April 8. Letters written to: Hon. F.B. Burch and Jon F. Oster, Esq., L. W. Bolte, Esq., R. A. Shelton and T. P. Perkins, III, Esqs., R. D. Coates, Esq., R. M. Pollitt, Esq., and Leonard J. Kerpel- man, Esq., setting case for Argument on all Demurrers, Motions, Petitions &c., filed as of the date of this notice, on Monday, May 11, 1970, at 10:00 A.M., per copies of letters filed.</p> <p>1970, April 13. Receipt of notification of assignment date from Robert A. Shelton and Thomas P. Perkins, III, Esqs., filed.</p> <p>1970, April 13. Receipt of notification of assignment date from Lee W. Bolte, Esq., filed.</p> <p>1970, April 13. Receipt of notification of assignment date from Raymond D. Coates, Esq., filed.</p> <p>1970, April 24. Receipt of notification of assignment date from Leonard J. Kerpelman, Esq., filed.</p> <p>1970, April 24. Letter from Leonard J. Kerpelman, Esq., to Frank W. Hales, Clerk, filed.</p> <p>1970, April 24. Copy of letter from Richard H. Outten, Assignment Clerk to Leonard J. Kerpelman, Esq., filed.</p>

1970, May 5. Plaintiff's Memorandum of Law, Table of Contents, and Certificate of Service thereon filed.

1970, May 6. Memorandum of Law of Defendant James B. Caine, Inc., and Certificate of Service thereon filed.

1970, May 11. Motion for summary judgment upon some Issues, Affidavit and Certificate of Service thereon, filed.

1970, May 11. Judge Daniel T. Prettyman on the Bench. Dave Dawson reporting.

1970, May 11. Leonard J. Kerpelman, Lee W. Bolte, Jon Oster, Raymond D. Coates, Thoman P. Perkins, III, Esqs. in Court.

1970, May 11. Hearing and Argument had on all preliminary Demurrers, Motions and Petitions filed as of this date. Rulings held sub-curia.

1970, May 11. The Motion for summary judgment upon some issues filed May 11, 1970, at 9:30 A.M., is reserved for future Argument and disposition.

1970, May 15. Answer to Memorandum of Law of Defendant James B. Caine, Inc., and Certificate of Service thereon filed.

1970, June 17. Supplementary Plaintiff's Memorandum of Law, and Certificate of Service filed.

1970, Aug. 31. Ordered that:-

1. The Petition to Intervene as Plaintiffs filed by the "North American Habitat Preservation Socirty and R. Doyle Grabarck, President and Individually, on January 26, 1970, is DENIED;
2. The Motion Ne Recipiatur filed by Defendant James B. Caine, Inc., to the said Petition to Intervene as Plaintiffs, on February 27, 1970, is DENIED;
3. The Motion Ne Recipiatur filed by Complainant to the said Motion Ne Recipiatur filed by the Defendant, James B. Caine, Inc., on March 11, 1970, is DENIED;
4. The Motion Raising Preliminary Objection filed by the Defendant James B. Caine, Inc., on October 21, 1969, is DENIED;
5. The Motion Ne Recipiatur filed by Complainant to Demurrer of the Defendant Maryland Marine Properties, Inc., on November 7, 1969, is DENIED;
6. The Demurrer of Defendant Maryland Marine Properties, Inc., to the Bill of Complaint, filed on October 20, 1969, is SUSTAINED, without leave to the Complaint to amend;
7. The Demurrer of Defendant Board of Public Works to the Bill of Complaint, filed on October 21, 1969, is SUSTAINED, without leave to the Complainant to amend;
8. The "Motion of Complainant for summary judgment upon same Issues" filed by the Complainant on May 11, 1970, being more in the nature of a Demad for Ad-

mission of Facts, (which would have been a more appropriate Pleading) is GRANTED, the facts therein having been conceded in the absence of any response thereto by the Defendants; and

9. The Complainant shall pay the costs of this proceeding, per Opinion and Order of Court filed. Copies of the Opinion and Order of Court mailed to Leonard J. Kerpelman, Esq., Jon F. Oster, Esq., Asst. Attorney General, Richard M. Pollitt, Esq., Lee W. Bolte, Esq., Raymond D. Coates, Esq., and to Thomas P. Perkins, III, Esq.

1970, Sept. 2. Demurrer of Defendant James B. Caine, Inc., and Certificate of service filed.

1970, Sept. 2. Answer to Intervene and Certificate of Service filed.

1970, Sept. 22. ORDERED that, for the reasons assigned in the Opinion and Order of this Court filed on August 31, 1970, which said Opinion is specifically incorporated herein, by reference thereto, as though fully set forth herein, the "Petition To Intervene as Plaintiffs" filed by the "North American Habitat Preservation Society" and R. Doyle Grabarck, on January 26, 1970, be, and the same is hereby DENIED, and the Demurrer of James B. Caine, Inc., be, and the same is hereby, SUSTAINED, without leave to the Complainant to amend, per Order of Court, filed. Copies of Order of Court mailed to Leonard J. Kerpelman, Esq., Jon F. Oster, Esq., Asst. Attorney General, Richard M. Pollitt, Esq., Lee W. Bolte, Esq., Raymond D. Coates, Esq., and Thomas P. Perkins, III, Esq.

1970, Sept. 29. Order for Appeal and Certificate of Service filed.

1970, Oct. 1. Photo copy of Amended Statement of costs dated October 1, 1970, mailed to Leonard J. Kerpelman, Esq., Hon. Francis B. Burch, Jon. F. Oster, Esq., Richard M. Pollitt, Esq., Lee W. Bolte, Esq., Raymond D. Coates, Esq., Thomas P. Perkins, III, Esq., and Robert A. Shelton, Esq., Copy of Amended Statement of costs filed.

1970, Oct. 5. Letter dated October 1, 1970, from Leonard J. Kerpelman, Esq., Baltimore, Maryland, to David Dawson, Court Reporter, filed.

1970, Oct. 7. Letter from Leonard J. Kerpelman, Esq., to Clerk, Worcester County Court, reply of Clerk at bottom of letter, copy of statement of costs dated Sept. 2, 1970, and copy of Amended Statement of costs dated October 1, 1970, filed. Copy of said letter, reply and statements of costs mailed to Leonard J. Kerpelman, Esq.

10/26/70
 Att'y. - \$10.00) Waived
 Clerk - 10.00) Pd. 9/30/69
 Clk. Add. - 5.00) Pd. 10/26/70
 Sheriff - 8.00) Pd. 9/30/69
 Balto. City. →
 Sheriff add'l 4.00) Pd. 9/30/69
 Wor. Co. →
 Clk. Add. - 90.00) Pd. 10/26/70
 Record - 25.00) Pd. 10/26/70

Defendant's costs.
 Att'y. -\$10.00) Pd. 10/26/70

Receipt #82106 & 91797

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CHANCERY DOCKET

#8934 (continued)

#8934 (continued)

- 1970, Oct. 8. Photo copy of Notice advising attorneys of record the case is ready for inspection and transmission to the Court of Appeals, mailed to Leonard J. Kerpelman, Esq.; Hon. Francis B. Burch; Hon. Jon F. Oster; Richard M. Pollitt, Esq.; Lee W. Bolte, Esq.; Raymond D. Coates, Esq.; Thomas P. Perkins, III, Esq.; and Robert A. Shelton, Esq., per original notice, filed.
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STATE OF MARYLAND, WORCESTER COUNTY, TO WIT:

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IN TESTIMONY WHEREOF, I hereunto
set my hand and affix the Seal
of the Circuit Court for Worcester
County, State of Maryland, this
27th day of October, A.D. 1970.

Frank W. Hales
Clerk of the Circuit Court for
Worcester County, Maryland.

By Mildred S. Hearthway
Mildred S. Hearthway
Deputy Clerk.

CERTIFIED COPY

NO. 8934 CHANCERY

ELINOR H. KERPELMAN,
COMPLAINANT
VS
BOARD OF PUBLIC WORKS OF
MARYLAND, ET AL

DOCKET ENTRIES

OFFICE OF
FRANK W. HALES
CLERK OF CIRCUIT COURT
FOR WORCESTER COUNTY
SNOW HILL, MD.

<p>LJK</p> <p>8934</p> <p>FBB</p> <p>JFO</p> <p>RMP</p> <p>S&B</p> <p>LWB</p> <p>RDC</p> <p>TPP, III</p> <p>RAS</p>	<p>Elinor H. Kerpelman 2403 W. Rogers Avenue Baltimore, Maryland 21209, Complainant,</p> <p>Vs.</p> <p>Non. Marvin Mandel, Governor, Louis L. Goldstein, Comptroller of the Treasury, and John Leutkemeyer, Treasurer; constituting the Board of Public Works of Maryland, State Office Building, 301 Preston Street, Baltimore, 1, Maryland. (Serve one copy on the Governor at above address, and one on Francis B. Burch, Esq., Attorney General of Maryland, one Charles Center, Baltimore, 2, Maryland) James B. Caine, Inc., a Maryland corporation (Serve on: James B. Caine, Resident Agent, 53rd & Ocean Highway, Ocean City, Worcester Co., Maryland), and Maryland Marine Properties, Inc., a Maryland corporation, (Serve on: Raymond D. Coates, Atlantic Hotel Building, Ocean City, Worcester Co., Maryland), Defendants.</p>	<p>1969, Sept. 30. Bill of Complaint for a Mandatory Injunction, and for Declaratory Relief and Interrogatories to the Defendant Board, filed.</p> <p>1969, Sept. 30. Subpoena with copies issued, together with copies of Bill of Complaint for a Mandatory Injunction, and for Declaratory Relief and Interrogatories to the Defendant Board attached and mailed to the Sheriff of Baltimore City and delivered to the Sheriff of Worcester County for service. "Summoned James B. Caine, Inc., by service upon James B. Caine and Maryland Marine Properties, Inc., by service upon Raymond D. Coates severally by leaving with each of them a copy of the Writ, together with Bill of Complaint for Mandatory Injunction and a Declaratory Relief Interrogatories to the Defendant Board attached this 30th day of September, 1969. So ans." R. Calvin Hall, Sheriff, By: James N. Jarman, Deputy Sheriff. "Non Est as to Hon. Marvin Mandel, Governor", J. Mufken, Frank J. Pelz, Sheriff. "Copy of the Process with a copy of Bill of Complaint served on Francis B. Burch, Esq., Attorney General of Maryland at One Charles Center, at 2:05 P.M. on the 1st day of October, 1969, in the presence of Sol Damoff", Frank J. Pelz, Sheriff.</p> <p>1969, Oct. 9. Second Subpoena with copy issued, together with copy of Bill of Complaint for a Mandatory Injunction and for Declaratory Relief and Interrogatories to the Defendant Board attached and mailed to the Sheriff of Baltimore City for service on the Governor.</p> <p>1969, Oct. 20. Demurrer of Defendant, Maryland Marine Properties, Inc., and Certificate of Service thereon, filed.</p> <p>1969, Oct. 20. Memorandum of Law of Defendant, Maryland Marine Properties, Inc., in Support of Demurrer, filed.</p> <p>1969, Oct. 21. Demurrer of Defendant Board of Public Works and Certificate of Service thereon, filed.</p> <p>1969, Oct. 21. Motion Raising Preliminary Objection, Request for Hearing and Certificate of Service thereon, filed.</p> <p>"Summoned Honorable Marvin Mandel, Governor, and a copy of the process with a copy of the Bill of Complaint left with the defendant at 301 W. Preston St., at 12:30 P.M. on the 27 day of October, 1969 in the presence of John Nuller, III", Frank J. Pelz, Sheriff.</p> <p>1969, Nov. 6. Reply to "Memorandum of Law of Maryland Marine in Support of Demurrer" and certificate of service thereon, filed.</p> <p>1969, Nov. 7. Motion Ne Recipiatur to Demurrer of Maryland Marine, Memorandum of Authorities and Certificate of Service thereon, filed.</p>
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 Record - 25.00) Pd. 10/26/70
 (Record to Supreme Court
 of U.S. - 25.00) Pd. 8/5/71

1970, May 5. Plaintiff's Memorandum of Law, Table of Contents, and Certificate of Service thereon filed.
 1970, May 6. Memorandum of Law of Defendant James B. Caine, Inc., and Certificate of Service thereon filed.
 1970, May 11. Motion for summary judgment upon some Issues, Affidavit and Certificate of Service thereon, filed.
 1970, May 11. Judge Daniel T. Prettyman on the Bench. Dave Dawson reporting.
 1970, May 11. Leonard J. Kerpelman, Lee W. Bolte, Jon Oster, Raymond D. Coates, Thoman P. Perkins, III, Esqs. in Court.
 1970, May 11. Hearing and Argument had on all preliminary Demurrers, Motions and Petitions filed as of this date. Rulings held sub-curia.
 1970, May 11. The Motion for summary judgment upon some issues filed May 11, 1970, at 9:30 A.M., is reserved for future Argument and disposition.
 1970, May 15. Answer to Memorandum of Law of Defendant James B. Caine, Inc., and Certificate of Service thereon filed.
 1970, June 17. Supplementary Plaintiff's Memorandum of Law, and Certificate of Service filed.
 1970, Aug. 31. Ordered that:-

1. The Petition to Intervene as Plaintiffs filed by the "North American Habitat Preservation Society and R. Doyle Grabarck, President and Individually, on January 26, 1970, is DENIED;
2. The Motion Ne Recipiatur filed by Defendant James B. Caine, Inc., to the said Petition to Intervene as Plaintiffs, on February 27, 1970, is DENIED;
3. The Motion Ne Recipiatur filed by Complainant to the said Motion Ne Recipiatur filed by the Defendant, James B. Caine, Inc., on March 11, 1970, is DENIED;
4. The Motion Raising Preliminary Objection filed by the Defendant James B. Caine, Inc., on October 21, 1969, is DENIED;
5. The Motion Ne Recipiatur filed by Complainant to Demurrer of the Defendant Maryland Marine Properties, Inc., on November 7, 1969, is DENIED;
6. The Demurrer of Defendant Maryland Marine Properties, Inc., to the Bill of Complaint, filed on October 20, 1969, is SUSTAINED, without leave to the Complainant to amend;
7. The Demurrer of Defendant Board of Public Works to the Bill of Complaint, filed on October 21, 1969, is SUSTAINED, without leave to the Complainant to amend;
8. The "Motion of Complainant for summary judgment upon same issues" filed by the Complainant on May 11,

Defendant's costs.

Att'y. -\$10.00) Pd. 10/26/70

Receipt #98643

Receipt #82106 & 91797

8934

8934

1970, being more in the nature of a Demand for Admission of Facts, (which would have been a more appropriate Pleading) is GRANTED, the facts therein having been conceded in the absence of any response thereto by the Defendants; and

9. The Complainant shall pay the costs of this proceeding, per Opinion and Order of Court filed. Copies of the Opinion and Order of Court mailed to Leonard J. Kerpelman, Esq., Jon F. Oster, Esq., Asst. Attorney General, Richard M. Pollitt, Esq., Lee W. Bolte, Esq., Raymond D. Coates, Esq., and to Thomas P. Perkins, III, Esq.

1970, Sept. 2. Demurrer of Defendant James B. Caine, Inc., and Certificate of service filed.
 1970, Sept. 2. Answer to Petition to Intervene and Certificate of Service filed.
 1970, Sept. 22. ORDERED that, for the reasons assigned in the Opinion and Order of this Court filed on August 31, 1970, which said Opinion is specifically incorporated herein, by reference thereto, as though fully set forth herein, the "Petition To Intervene as Plaintiffs" filed by the "North American Habitat Preservation Society" and R. Doyle Grabarck, on January 26, 1970, be, and the same is hereby DENIED, and the Demurrer of James B. Caine, Inc., be, and the same is hereby, SUSTAINED, without leave to the Complainant to amend, per Order of Court, filed. Copies of Order of Court mailed to Leonard J. Kerpelman, Esq., Jon F. Oster, Esq., Asst. Attorney General, Richard M. Pollitt, Esq., Lee W. Bolte, Esq., Raymond D. Coates, Esq., and Thomas P. Perkins, III, Esq.
 1970, Sept. 29. Order for Appeal and Certificate of Service filed.
 1970, Oct. 1. Photo copy of Amended Statement of costs dated October 1, 1970, mailed to Leonard J. Kerpelman, Esq., Hon. Francis B. Burch, Jon. F. Oster, Esq., Richard M. Pollitt, Esq., Lee W. Bolte, Esq., Raymond D. Coates, Esq., Thomas P. Perkins, III, Esq., and Robert A. Shelton, Esq., Copy of Amended Statement of costs filed.
 1970, Oct. 5. Letter dated October 1, 1970, from Leonard J. Kerpelman, Esq., Baltimore, Maryland, to David Dawson, Court Reporter, filed.
 1970, Oct. 7. Letter from Leonard J. Kerpelman, Esq., to Clerk, Worcester County Court, reply of Clerk at bottom of letter, copy of statement of costs dated Sept. 2, 1970, and copy of Amended Statement of costs dated October 1, 1970, filed. Copy of said letter, reply and statements of costs mailed to Leonard J. Kerpelman, Esq.

8934

CHANCERY DOCKET

#8934 (continued)

#8934 (continued)

- 1970, Oct. 8. Photo copy of Notice advising attorneys of record the case is ready for inspection and transmission to the Court of Appeals, mailed to Leonard J. Kerpelman, Esq.; Hon. Francis B. Burch; Hon. Jon F. Oster; Richard M. Pollitt, Esq.; Lee W. Bolte, Esq.; Raymond D. Coates, Esq.; Thomas P. Perkins, III, Esq.; and Robert A. Shelton, Esq., per original notice, filed.
- 1970, Oct. 26. Order to enter an appeal to the Court of Appeals of Maryland from the judgment of the Court dated Sept. 22, 1970, per Order filed.
- 1970, Oct. 27. Original papers of record, together with certified copy of docket entries and statement of costs transmitted to the Court of Appeals of Maryland, Annapolis, Maryland, 21404; sent certified mail, return receipt requested.
- 1970, Oct. 29. Return receipt filed.
- 1971, May 13. Transcript of record returned from Court of Appeals of Maryland and filed.
- 1971, May 13. (October 30, 1970: Motion to Dismiss appeal filed by James B. Caine, Inc., one of appellees.)
- 1971, May 13. (November 16, 1970: Motion to dismiss granted and that appeal dismissed.)
- 1971, May 13. (April 12, 1971: Order of August 31, 1970, affirmed the appellant to pay the costs. Opinion by Barnes, J.), per Mandate, filed.
- 1971, July 22. Letter dated July 19, 1971, from Leonard J. Kerpelman, Esq., Baltimore; Maryland, to Clerk Circuit Court for Worcester County, filed.
- 8934 1971, July 23. Copy of letter from Frank W. Hales, Clerk, to Leonard J. Kerpelman, Esq., Baltimore, Maryland, filed.
- 1971, July 23. Statement of costs mailed to Leonard J. Kerpelman, Esq., Baltimore, Maryland, per copy filed.
- 1971, Aug. 9. Letter to Leonard J. Kerpelman, Esq., from Frank W. Hales, Clerk, advising case is being forwarded to the Supreme Court of the United States, Supreme Court Building, Washington, D.C. Photo copy of letter filed. Photo copy of letter mailed to the attorneys of record, namely: Honorable Francis B. Burch, Attorney General; Honorable Jon F. Oster, Assistant Attorney General; Richard M. Pollitt, Esq.; Lee W. Bolte, Esq.; Raymond D. Coates, Esq.; Thomas P. Perkins, III, Esq., and Robert A. Shelton, Esq.
- 1971, Aug. 9. Original papers of record, together with certified copy of docket entries transmitted to the Clerk of the Supreme Court of the United States, Supreme Court Building, Washington, D.C.; sent certified mail, return receipt requested.

STATE OF MARYLAND, WORCESTER COUNTY, TO WIT:

I, Frank W. Hales, Clerk of the Circuit Court for Worcester County, State of Maryland, hereby certify that the foregoing is a true and correct copy of the docket entries in case No. 8934 Chancery, in the Circuit Court for Worcester County; same being the case of Elinor H. Kerpelman, Complainant, Vs. Hon. Marvin Mandel, Governor, Louis, L. Goldstein, Comptroller of the Treasury, and John Leutkemeyer, Treasurer, Constituting the Board of Public Works of Maryland, State Office Building, 301 Preston Street, Baltimore 1, Maryland. (Serve one copy on the Governor at above address, and one on Francis B. Burch, Esq., Attorney General of Maryland, One Charles Center, Baltimore 2, Maryland), James B. Caine, Inc., a Maryland corporation, (Serve on: James B. Caine, Resident Agent, 53rd & Ocean Highway, Ocean City, Worcester Co., Maryland) and Maryland Marine Properties, Inc., a Maryland Corporation, (Serve on: Raymond D. Coates, Atlantic Hotel Building, Ocean City, Worcester Co., Maryland), Defendants.



IN TESTIMONY WHEREOF, I hereunto set my hand and affix the Seal of the Circuit Court for Worcester County, State of Maryland, this 9th day of August, A.D. 1971.

Frank W. Hales
Clerk of the Circuit Court for
Worcester County, Maryland.

#8874
Datta-1969 ELINOR H. KERPELMAN
BOARD OF PUBLIC WORKS

9/16/69 - Demures Sustained
with leave to amend
in 20 days

R 5
S 4
B 166

ELINOR H. KERPELMAN	:	IN THE
Complainant	:	CIRCUIT COURT # 2
vs.	:	OF
FRANCIS B. BURCH,	:	BALTIMORE CITY
Attorney General of Maryland	:	78A/228
Defendant	:	42831A
	:	
	:	
:::	:	:::
	:	
	:	

ANSWER

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Now comes Defendant, Francis B. Burch, in his capacity as Attorney General of Maryland, by his attorney, Robert F. Sweeney, Deputy Attorney General, and in his individual capacity, by his attorney, William W. Cahill, Jr., and, in answer to the Bill of Complaint for an Injunction, and each and every paragraph thereof, says:

1. That in answer to Paragraph 1 of said Bill of Complaint, he admits that litigation, captioned "Kerpelman v. Mandel, et al.", Circuit Court No. 2 of Baltimore City, Docket 78A, Folio 142, File No. 42686-A", was filed by the Complainant herein; that on August 7, 1969, he filed a Demurrer and Memorandum in support thereof on behalf of the Defendant Board of Public Works of Maryland in that litigation; and that on September 29, 1969, the litigation was dismissed by Order of Court, upon payment of costs by the Complainant, after the Demurrers and Motions Raising Preliminary Objections of various defendants had been sustained with leave granted to the Complainant herein to amend her Bill of Complaint within 20 days. He avers that Complainant's characterization of the legal and factual allegations raised in that litigation, contained in Paragraph 1 of the present Bill

of Complaint, should be disregarded by this Honorable Court, the Bill of Complaint in that terminated litigation being the best evidence of its contents. He denies the remaining allegations of Paragraph 1 of the Bill of Complaint.

2. That he denies the allegations contained in Paragraph 2 of the Bill of Complaint, except that he admits that his appearance was entered as counsel for the Defendant Board of Public Works of Maryland in the terminated litigation entitled "Kerpelman v. Mandel, et al., Circuit Court No. 2 of Baltimore City, Docket 78A, Folio 142, File No. 42686-A" and has also been entered as counsel for Defendant Board of Public Works of Maryland in the pending litigation, captioned "Kerpelman v. Mandel, et al., Circuit Court for Worcester County, Chancery No. 8934", filed on September 30, 1969; and that he filed a Demurrer, sustained by the Circuit Court No. 2 of Baltimore City, to the Bill of Complaint in the terminated litigation.

3. Because no additional allegations are contained in Paragraph 3 of the Bill of Complaint, no answer is required to that paragraph.

4. That he denies the allegations contained in Paragraph 4 of the Bill of Complaint, except that he admits that he is constitutionally required, by Article V, Section 3 of the Maryland Constitution, to provide legal representation to the Board of Public Works of Maryland in actions brought against it.

5. Because no additional allegations are contained in Paragraph 5 of the Bill of Complaint, no answer is required to that paragraph.

6. That he denies the allegations contained in Paragraph 6,

except that he admits that Chapter 402 of the Laws of Maryland of 1969 amended Article 19A of the Maryland Code, title "Conflict of Interest", and that he admits the partial ownership of two parcels of real estate located in Ocean City, Maryland, upon which it is anticipated that an inn will be built, which interest is more specifically described in Paragraph 7, infra.

And further answering, says:

7. That he, in and through a partnership with nine others known as "Ocean City Joint Venture & Partnership", purchased 200 feet of ocean-front property in the northern part of Ocean City, Maryland, by deed dated March 15, 1969, and recorded on April 3, 1969. This same entity purchased on January 9, 1969, an option on an adjoining parcel of land consisting of an additional 245 feet of ocean-front property. He is one of four trustees, all of whom are partners, authorized by the Joint Venture and Partnership Agreement to act on behalf of all the partners in the venture. The entity has purchased a franchise from Holiday Inns of America, has solicited bids from several construction companies, and anticipates in the near future the commencement of construction at this site of a Holiday Inn facility opening on or about April 15, 1971. His capital share in this undertaking is approximately 10.5%. He owns no other real estate in Maryland, either directly or indirectly, which fronts upon either ocean, rivers, bays, streams, or other navigable bodies of water.

8. That the decisions of the Board of Public Works of Maryland being tested by the Complainant in "Kerpelman v. Mandel, et al.", Circuit Court for Worcester County, Chancery No. 8934" are those authorizing transfer by the State of Maryland of 190 acres of "wetlands" property to James B. Caine, Inc., a Maryland

corporation, and 197 acres of "wetlands" property to Maryland Marine Properties, Inc., a Maryland corporation, both of which transfers of land involved land in and abutting tidal bays in Worcester County, Maryland.

9. That Complainant is challenging, first, the authority of the Board of Public Works of Maryland to dispose of these two tracts of "wetlands" property alleging that "wetlands" property cannot be conveyed from public to private ownership, and, second, the good faith of the Board of Public Works of Maryland in making these transfers because of the inadequacy of the consideration paid for them.

10. That with respect to Complainant's first allegation outlined in Paragraph 9 of this Answer, supra (directly contrary to the scurrilous innuendos and malicious suggestions of impropriety contained in Paragraphs 2, 4 and 6 of the Bill of Complaint filed in the within proceeding), the Defendant denies that he "has a direct financial interest in having the question of ownership of submerged lands in front of shore lands on navigable waters ... resolved against the people and the State of Maryland"; to the contrary, the Defendant states that he has no personal interest whatsoever in the outcome of said litigation; and the Defendant further denies that he "has a direct financial interest in placating and favoring county zoning and public officials of Worcester County", stating that at the time of the purchase of the 200 feet of ocean-front property and the acquisition of the option for the additional 245 feet of ocean-front property by the partnership, of which the Defendant is a member, all of said ocean-front property was then and is now zoned for the use intended and in addition, at the time of said acquisitions, public water and sewer existed along the entire western property line of said property; and the Defendant further states that all that need be done by any public officials in Worcester County

with respect to the development of said ocean-front property is the ministerial duty of issuing a building permit upon application and payment of the fees therefor by the partnership and the granting of a height variance by the Board of Zoning Appeals of Ocean City in accordance with that Board's consistently applied and unvaried practice of granting such variances upon application.

11. That with respect to Complainant's second allegation outlined in Paragraph 9, supra, no possibility of conflict of interest, either direct or indirect, exists.

12. That, in order that there can be no shadow of doubt as to the propriety of Defendant's conduct in representing the Board of Public Works of Maryland in "Kerpelman v. Mandel, et al.," Circuit Court for Worcester County, Chancery No. 8934" and despite Defendant's firm belief that no real or imagined conflict exists, he has followed the express procedure set out in Article 19A, Sections 1-3 of the Maryland Code and has written the Governor of Maryland regarding this matter, pursuant to Section 3 of that Article, a copy of which letter is attached hereto as Exhibit A.

WHEREFORE, Defendant prays that the Bill of Complaint for an Injunction be dismissed with prejudice and that all costs therefor be assessed against the Complainant.

Robert F. Sweeney
Deputy Attorney General
1200 One Charles Center
Baltimore, Md. 21201
539-4833
Attorney for Defendant in his capacity
as Attorney General of Maryland

William W. Cahill, Jr.
10 Light Street
Baltimore, Md. 21202
539-2125
Attorney for Defendant in his
individual capacity

OFFICES OF



THE ATTORNEY GENERAL
ONE CHARLES CENTER
BALTIMORE, MARYLAND 21201

FRANCIS B. BURCH
ATTORNEY GENERAL

October 21, 1969

Honorable Marvin Mandel
Governor of Maryland,
State House
Annapolis, Maryland

Dear Governor Mandel:

Leonard J. Kerpelman, Esq. represents the complainant in a suit recently filed and now pending in the Circuit Court for Worcester County (Kerpelman v. Mandel, et al, Circuit Court for Worcester County, chancery #8934, filed September 30, 1969) which seeks a reconveyance of the wetlands transferred by the Board of Public Works of Maryland to James B. Caine, Inc. and Maryland Marine Properties, Inc. Because Article V, Sect. 3 of the Maryland Constitution requires that I represent agencies and departments of the State Government, the suit papers were forwarded to me and I have just entered my appearance on behalf of the Board of Public Works of Maryland. The Bill of Complaint questions the authority of the Board of Public Works of Maryland to transfer wetlands property from public ownership to private ownership and alleges fraud and bad faith on the part of the members of the Board of Public Works, because of the purportedly inadequate consideration supporting the transfer.

Mr. Kerpelman, by a separate suit now seeks to enjoin me from representing the Board of Public Works of Maryland in the Worcester County litigation because of an alleged conflict of interest involving a personal real estate investment. I personally feel that the position of Mr. Kerpelman is scurrilous, is entirely unjustified and is prompted by highly questionable motives. In order to satisfy the trial courts where the litigation is pending, as well as the citizens of Maryland that no impropriety or conflict whatsoever exists, I am requesting that you review the matter, pursuant to your authority contained in Article 19 A of the Maryland Code, and advise whether in your opinion any conflict does exist.

Honorable Marvin Mandel
October 21, 1969
Page two

Article 19 A, as amended by Chapter 402 of the Laws of Maryland of 1969, permits you as Governor (as, I understand no Board of Ethics has as yet been appointed), to determine whether an agency head is personally and substantially involved as a State official in a judicial or other proceeding in which he has a "financial interest" as defined by Section 2 of the Article.

Since you are one of the defendants in the suit which Mr. Kerpelman has sought to enjoin me from participating in, it might be that if you were to make a determination as to any possible conflict on my part, Mr. Kerpelman in turn would make an unfounded and malicious charge that you too were guilty of a conflict because you were acting in a matter in which you yourself would have a personal interest. Therefore, you might want to consider referring the matter to the Committee on Ethics of the Maryland State Bar Association for an advisory opinion which you could take into consideration in making your final determination under the provisions of Article 19 A.

Along with nine other partners I have an interest in 200 feet of ocean-front property in the northern part of Ocean City, Maryland, which property was conveyed to the partnership by deed dated March 16, 1969, recorded among the land records of Worcester County on April 3, 1969. We also purchased on January 9, 1969 an option on the adjacent parcel consisting of an additional 245 feet of ocean-front property. We have obtained a franchise from Holiday Inns of America and intend to build a Holiday Inn facility on this property. We have obtained bids from several construction companies and anticipate commencement of construction in the near future with a target date for opening of April 15, 1971. My capital share in this venture is approximately 10.5%. I own no other real estate, either directly or indirectly, which fronts upon oceans, rivers, bays or other navigable bodies of water in Maryland and specifically have no interest in real property fronting upon Sinepatuxent Bay or Assowoman Bay in Worcester County.

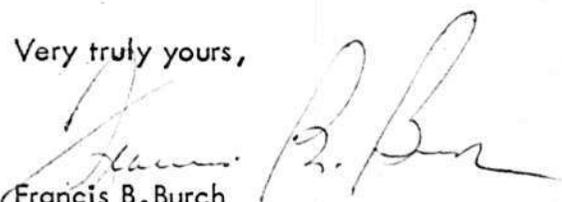
It is my firm belief that the ocean-front property in which I have an interest can in no way be affected by the outcome of Mr. Kerpelman's suit respecting transfers of wetlands by the Board of Public Works of Maryland in the tidal bays in Worcester County.

Under these circumstances I would very much appreciate your reviewing this situation and advising me as soon as possible whether you find any conflict between my personal investment and my representation of the Board of Public Works of Maryland in the litigation in question.

Honorable Marvin Mandel
October 21, 1969
Page three

I am enclosing for your consideration a copy of the Bill of Complaint and Demurrer in the Worcester County suit and of the Bill of Complaint and Answer in Mr. Kerpelman's suit against me.

Very truly yours,


Francis B. Burch
Attorney General

M. Osher
Q. S. Ter

ELINOR H. KERPELMAN,

Complainant

v.

FRANCIS B. BURCH,

Defendant

IN THE
CIRCUIT COURT
NO. 2 OF
BALTIMORE CITY
Case #42831A

• • • • •
ANSWER TO MOTION
TO QUASH

Now comes Elinor H. Kerpelman, Complainant, by Leonard J. Kerpelman, her attorney, and for answer to the Motion to Quash heretofore filed herein on approximately December 30, 1969, says:

1. She denies that all of the information requested by the subpoena has been "on several occasions disclosed" to the Complainant or her attorney; she further states that she is entitled to much more detailed and further information than the simple "raw data"; and she further states that whether or not "said information has been duly reported by the press" is of no consequence to her, nor any assistance in the process of discovery.
2. She denies that the pending "Motion for Summary Judgment" will dispose of the entire case.
3. The Complainant denies that she had knowledge that at the time the subpoena was made returnable to, it was "public knowledge" that the movant would be in the Far East; on the contrary, the press reported that he would have returned to this country at least one week prior thereto. The Complainant's attorney emphatically denies that the said subpoena was issued as "an harassment", and moves that the said allegations be stricken herefrom as scandalous, under the Maryland Rules. No "Xerox copy" of any release was attached to the copy which was mailed to the Complainant's attorney, and no answer is therefore supplied herein to the allegations concerning such a "Xerox copy".
4. All matters complained of in the suits at issue occurred prior to the time that the movant was an officer of the

United States of America, and he was then a citizen of Maryland, and acted as a citizen and official of Maryland, and it is for his acts as an official of Maryland that these inquiries are to be conducted in furtherance of the discovery procedure. No objective will be served by postponing the discovery procedure pending any motion for summary judgment, as the motion and the answer thereto show a clear dispute as to material facts; further, other disputes as to material facts may reasonably be expected to be disclosed by the very deposition which the subpoena is related to.

The Complainant has no desire whatsoever to interfere with the performance of the movant's duties as Vice President of the United States of America; on the contrary, the Complainant sent to the movant's office in far sufficient time to have received an answer before the issuance of the subpoena, a very polite and diplomatic request to arrange for the deposition at a time and place convenient to the movant; this the Complainant is, of course, still willing to do; further, the Complainant has assumed, since it appeared after the issuance of the subpoena that the undisclosed plans of the movant would keep him out of the country on the return day of the subpoena, that the deposition would be postponed, and the Complainant has no objection to this postponement whatsoever; as a matter of fact, a simple telephone call from the movant's office will certainly effect the full cooperation of the Complainant in taking of the deposition of the movant at such time and place as the movant may at his full discretion suggest, providing only that the date is one within a reasonably short period of time.

Leonard J. Kerpelman
 Attorney for Complainant
 2403 Rogers Building
 Baltimore 9, Maryland (Mailing Add.)

I hereby certify that on this _____ day of January, 1970, a copy of the foregoing Answer to Motion to Quash was mailed, as well as of the following Memorandum of Points and Authorities, to George W. White, Jr., Esq., 10 Light st., Baltimore, Md.; and to Fred Oken, Esq., Attorney for Francis B. Burch, 1201 One Charles Center, Baltimore, Md.

ELINOR H. KERPELMAN,

Complainant

v.

FRANCIS B. BURCH,

Defendant

MEMORANDUM OF POINTS
AND AUTHORITIES

1. Md. Rule 301 i "Scandalous matter may be stricken...".

2. Mississippi v. Johnson, 71 U.S. 475 (1866) At 49B: "The single point which requires consideration is this; Can the President be restrained by information from carrying into effect an act of Congress alleged to be unconstitutional?" (Held; He cannot.)

The case is cited only to show that it is inapplicable, as Mr. Agnew is not sought to be restrained from carrying out any unconstitutional act as Vice President; it is respectfully argued that it is not believed to be the case, that Mr. Agnew's acts as Vice President are sought to be enjoined.

3. Md. Rule 401 a. "At any time after jurisdiction has been obtained over any defendant, ...any party...may...cause the testimony of any person, whether a party or not, to be taken by deposition for the purpose of discovery, or for use as evidence in the action, or both."

4. Md. Rule 5 q; "'person', means any natural person, partnership, (or) joint stock company...", which, it is respectfully argued, would seem to include Mr. Agnew just as much as anybody else.

5. GJS Process Sec. 84; "One who...enters a state...solely for the performance of a duty of a public nature...is generally privileged from service of civil process...However...(the exemption) will not apply where the person served was not acting in a governmental capacity." Citing American Industrial Finance v. Sholz, 279 Ill. App. 45.

6. GJS Officers. Sec. 132, Actions against Officers; "Courts should not discourage actions on the part of citizens to compel a strict observance by public officials of their duties but, as far as authorized by law, should encourage such practice." Citing Veith v. Tinnell, 207 SW ed. 325 (Ky.) and Al Walker, Inc. v. Borough, 130 A2d 372 (N.J.).

Leonard J. Kerpelman
Attorney for Complainant

LEONARD J. KERPELMAN

ATTORNEY AT LAW
CHAMBERS AT
500 EQUITABLE BUILDING
CALVERT AND FAYETTE STS.
BALTIMORE, MARYLAND 21202

Fred Oken, Esq.
1201 One Charles Center
Baltimore 2, Maryland



WILLIAM M. HARNETT

UNITED STATES POSTAGE



SIX CENTS

AMERICAN PAINTING

Handwritten signature
ELINOR H. KERPELMAN,
Plaintiff
v.
MARVIN MANDEL, et al.,
Defendants

IN THE
CIRCUIT COURT
NO. 2 OF
BALTIMORE CITY

• • • • •
PETITION TO SUBSTITUTE COPY
FOR ORIGINAL

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Now comes Elinor H. Kerpelman, by Leonard J. Kerpelman, her attorney,
and says:

1. Heretofore there was filed herein the Plaintiff's brief.
2. Said brief, in its original copy as filed, is fourteen pages long, and proceedings in the within matter having been, it is believed, concluded, the Plaintiff's attorney would like to retrieve the original copy, which is subject to reproduction, and substitute therefor a carbon copy.

WHEREFORE, the Plaintiff prays that she may be allowed to have the return of the original copy of the brief heretofore filed herein, and substitute therefor a carbon copy.

Leonard J. Kerpelman
Attorney for Plaintiff

I HEREBY CERTIFY that a copy of the foregoing was mailed this 3rd day of November, 1969, to Joseph H. Young, Esq., 901 First National Bank Bldg., Thomas Perkins, III, Esq., Mercantile Trust Bldg., and Fred Oken, 1201 One Charles Center, Baltimore, Maryland.

ELVIE FVM Leonard J. Kerpelman
Attorney for Plaintiff

NOV 2 1969

ORDER RECEIVED

The relief prayed is hereby granted this _____ day of _____ 1969, by the Circuit Court No. 2 of Baltimore City, and the Clerk is directed to return the original of the Plaintiff's brief and to substitute in the file a carbon copy.

Judge

LEONARD J. KERPELMAN

ATTORNEY AT LAW
CHAMBERS AT
500 EQUITABLE BUILDING
CALVERT AND FAYETTE STS.
BALTIMORE, MARYLAND 21202



Fred Oken, Esq.
1201 One Charles Center
Baltimore, Maryland

COPY

LAW OFFICES

WEINBERG AND GREEN

TWENTIETH FLOOR
10 LIGHT STREET
BALTIMORE, MD. 21202

LEONARD WEINBERG
MILTON S. SCHILLER
ROBERT F. SKUTCH, JR.
J. PAUL SCHMIDT
ROBERT L. WEINBERG
J. C. MERRIMAN
WINSTON T. BRUNDIGE
WILLIAM W. CAHILL, JR.
JOHN J. GHINGHER, JR.
MARK D. COPLIN

JAMES H. LANGRALL
HERBERT H. HUBBARD
DAVID R. COHAN
RONALD E. CREAMER
DAVID M. BLUM
JOHN R. ROYSTER
J. EDWARD DAVIS
ROGER K. GARFINK
WILBUR C. JENSEN
SAMUEL J. MILLER, JR.
JACOB B. DAVIS

T. CONWAY MATTHEWS
HOWARD M. FRIEDEL
HOWARD B. MILLER
EARL F. LEITESS
BARRY D. BERMAN
SHELDON S. SATISKY
WILLIAM H. HOLDEN, JR.
JAMES W. HOLTZWORTH
STANLEY J. NEUHAUSER

L. HOLLINGSWORTH PITTMAN
JULIAN I. JACOBS
PAUL S. BEATTY
RICHARD J. HIMELFARB
LESLIE J. POLT
HERBERT BETTER
WILLIAM E. SCHOLTES
JACK N. ZEMIL
ROBERT W. CANNON

GEORGE COCHRAN DOUB
JOSEPH ALLEN
CHARLES J. STINCHCOMB
COUNSEL

HARRY J. GREEN
1906-1964

AREA CODE 301
539-2125

CABLE ADDRESS "WEITEN"

November 24, 1969

**Mr. James V. Campbell
Assignment Commissioner
The Courthouse - Room 407
Baltimore, Maryland 21202**

**Re: Kerpelman v. Burch
78A/228/42831A
Cent. Assn. No. 2914A
December 4, 1969**

Dear Mr. Campbell:

I received a copy of Mr. Kerpelman's letter of November 18, 1969, requesting postponement of the December 4 trial date of the above captioned matter. It may well be that the case cannot be heard on that date, however, a general continuance, without the assignment of a new date should not be granted on the basis that Mr. Kerpelman will depose Vice President Agnew.

Mr. Sweeney and I will request a conference with Judge Perrott in order to request a firm trial date. In this regard, we have filed Motion for Summary Judgment as to the First Count, and it may be that a hearing on the motion will dispose of the entire case.

Sincerely yours,

Bill
William W. Cahill, Jr.

14:gs

cc: The Honorable James A. Perrott
Robert F. Sweeney, Esquire
Leonard J. Kerpelman, Esquire

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OKEN

October 10, 1969

Joseph H. Young, Esq.
900 First National Bank Bldg.
Baltimore 2, Maryland

Re: Kerpelman v. Mandel
Wetlands Case
Circuit Court No. 2

Dear Mr. Young:

I say this not as sarcasm - really - but as fact:

Your letter dated October 6 complaining - entirely justifiably - about my mis-mailing, was postmarked October 8.

Further, it was sent to an address I had not had for over five years, but which mistakenly (this time the Bar Association's mistake - they are not perfect, either) appeared in the 1968 Lawyers' Directory. This Directory has been obsolete for at least eight months, as the 1969 Directory - with proper corrections - was mailed out last January. Surely, therefore, the office procedures at Piper & Marbury can thus also be criticized, can they not? Particularly when, as I believe is known, this Directory raised a storm of outrage for its inaccuracies when published.

Thus, by your office's negligence, as I say, I received your letter of October 6 on October 10.

Again I say that the error in the Motion to Dismiss was mine, and I am sorry; and I do not seek to minimize it. It was an important error in an important matter.

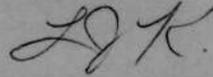
But your use of the phrase "I am surprised at your conduct", and Mr. Perkins' similar imputation of misconduct the other day, in the course of the expression of which he hung up on me, I find - to say the least, to be a rather distressing intemperateness, which itself, if you will search

Jos. H. Young, Esq.

October 10, 1969
Page 2

the Canons of Ethics just a little, can be said to be misconduct.

Very sincerely yours,



Leonard J. Kerpelman

LJK:bj

cc: Hon. James A. Perrott
Thomas Perkins, Esq.
Fred Oken, Esq.

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October 9, 1969

Mr. Andrew Heubeck, Jr.
Secretary
Board of Public Works
Post Office Box 429
Annapolis, Maryland 21401

Re: Kerpelman v. Mandel, et al.,
constituting the Board of Public Works
Circuit Court for Worcester County

Dear Mr. Heubeck:

In connection with our representation of the Board of Public Works in the above-captioned suit, we ought to have copies of the parts of the Minutes of meetings of the Board of Public Works relating to the subject matter of the suit, namely, the property of James B. Caine, Inc. (190 acres) and the property of Maryland Marine Properties, Inc. (197 acres).

We are enclosing a copy of Interrogatories that have been directed to the Board by Mr. Kerpelman. Please answer these Interrogatories to the best of your ability for our information so that, if the suit develops to the point where we are required to furnish the information to Mr. Kerpelman, we shall be in a position to do so.

Very truly yours,

Fred Oken
Assistant Attorney General

FO:imb

Enclosure

October 9, 1969

Honorable James A. Perrott
Court House
Baltimore, Maryland 21202

RE: KERPELMAN v. MANDEL
(Wetlands Case)

Dear Judge Perrott:

I have received a letter from Tom Perkins, Esq., informing me that he only received a copy of my "Motion to Dismiss Bill of Complaint" on October 3; that the certificate of mailing stated ^{Sept. 29} that actually the postmark was October 1. Meantime, the Court at my request, acted on my Motion on September 29.

Mr. Perkins is correct, and the explanation, your Honor, I am very sad to say, is a dumb girl, for the copies were supposed to have been, according to my quite usual and in fact invariable procedure, mailed on September 25, and I believed they had been. The girl is new. I have, of course, taken corrective steps, which are, obviously, of little comfort to defense counsel.

Whatever your Honor wishes to order in the case, I am perfectly ready to accede to.

My only thought on the matter is that it seems that the new case - this is what probably concerns counsel - in Worcester County could have been filed before the Baltimore case was dismissed. My impression of the law is that the pendency of the first case was no bar to filing of the second. I am searching this point now.

Very sincerely yours,

LEONARD J. KERPELMAN

LJK:ebc

cc - Thomas P. Perkins, Esquire
Mercantile Trust Building
Baltimore, Maryland 21202

Joseph H. Young, Esquire
First National Bank Building
Baltimore, Maryland 21202

Fred Oken, Esquire
One Charles Center
Baltimore, Maryland 21201

COPY

VENABLE, BAETJER AND HOWARD
MERCANTILE TRUST BUILDING
BALTIMORE, MD. 21202

Mr. Oken

October 6, 1969

Leonard J. Kerpelman, Esquire
500 Equitable Building
Calvert and Fayette Streets
Baltimore, Maryland 21202

Re: Kerpelman vs. Marvin Mandel, et al
Circuit Court No. 2 of Balto. City

Dear Mr. Kerpelman:

On Friday, October 3, 1969, I received in the mail a copy of a Motion to Dismiss the Bill of Complaint in the above captioned case without prejudice. The envelope bears your return address and is post-marked October 1, 1969. The Motion bears a Certificate of Service stating that a copy of the Motion was mailed to me and to other counsel on September 25, 1969. I now find that on September 29, 1969 an Order was signed on the Motion.

I would like to have from you a complete explanation of the above.

Sincerely,

Thomas P. Perkins III

TPPIII:agh
cc: Joseph H. Young, Esquire
Fred Oken, Esquire

RECEIVED

OCT 1 1969

RECEIVED

COPY

LAW OFFICES OF
PIPER & MARBURY
900 FIRST NATIONAL BANK BUILDING
LIGHT & REDWOOD STREETS
BALTIMORE, MARYLAND 21202

TELEPHONE
LEXINGTON 9-2530

October 6, 1969

Leonard J. Kerpelman, Esq.
900 Light Street
Baltimore, Maryland 21230

Re: Kerpelman v. Mandel, et al
Our file 6955-1

Dear Mr. Kerpelman:

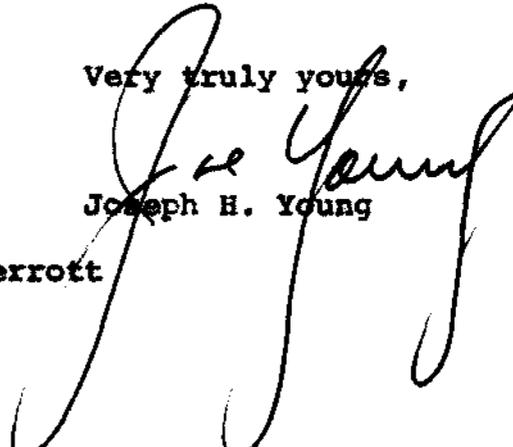
On October 2 I received a copy of the motion to dismiss bill of complaint without prejudice in connection with the above litigation. Affixed to the motion was a certificate of mailing dated September 25. However, the envelope in which the motion came bore a postage cancellation mark of October 1, 1969. Attached to the certificate was a typewritten note stating "Please call me if there is any objection. We will then arrange a conference with Judge Perrott."

Upon receiving the motion, I checked with the Clerk's office and was quite surprised to learn that the order was signed on September 29, 1969, before the motion was mailed and without any notice to counsel.

Frankly, I am quite surprised at your conduct in the method in which this motion was filed since my client does object to the motion to dismiss without prejudice and had I been given timely notice, I would have advised all parties of that objection.

So that I can inform my client of the method in which this litigation was terminated, I would appreciate it if you would give me some explanation.

Very truly yours,


Joseph H. Young

JHY:mbw

CC: Honorable James A. Perrott
Thomas Perkins, Esq.
Fred Oken, Esq.

LAW OFFICES OF
PIPER & MARBURY
800 FIRST NATIONAL BANK BUILDING
LIGHT & REDWOOD STREETS
BALTIMORE, MARYLAND 21202

COPY

TELEPHONE
LEXINGTON 9-2530

Mr. Oken

September 16, 1969

Leonard Kerpelman, Esq.
900 Light Street
Baltimore, Maryland 21230

Thomas Perkins, Esq.
1400 Mercantile Trust Building
Baltimore, Maryland 21202

Fred Oken, Esq.
1200 One Charles Center
Baltimore, Maryland 21201

Re: Kerpelman v. Mandel, et al
Our file 6955-1

Dear Sirs:

I enclose copy of an Order that I propose to file with the Court on September 17.

Please call me if you have any objections to the wording of the Order.

Very truly yours,

Joseph H. Young
Joseph H. Young

JHY:mgw
Enc.

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M. Chan

August 14, 1969

Leonard J. Kerpelman, Esq.
500 Equitable Building
Calvert and Fayette Sts.
Baltimore, Md. 21202

Re: Kerpelman v. Board of Public Works,
et al.

Dear Mr. Kerpelman:

Your letter of August 13th withdrawing your "offer of compromise" in the above captioned matter reached my desk at the same time as a letter from Governor Mandel relating to that offer.

The Governor and I are in agreement that we could not accept that "offer of compromise", for a variety of reasons.

I thank you, however, for the courtesy of your offer.

Sincerely,

Francis B. Burch
Attorney General

gjc

LEONARD J. KERPELMAN

ATTORNEY AT LAW
CHAMBERS AT
500 EQUITABLE BUILDING
CALVERT AND FAYETTE STS.
BALTIMORE, MARYLAND 21202

TELEPHONE SA 7-8700
RESIDENCE: NO 9-2112

CABLE: BOLTLEX

REGISTERED PATENT
ATTORNEY

August 13, 1969

Francis B. Burch, Esq.
1201 One Charles Center
Baltimore, Maryland 21201

Dear Mr. Burch:

My offer of compromise heretofore made in the above
matter is hereby withdrawn.

Very truly yours,


Leonard J. Kerpelman

LJK:bj

Clinton N. Kerpelman
Lawson
Ch. Ct. #2
78A/142/42686/



EXECUTIVE DEPARTMENT

ANNAPOLIS, MARYLAND 21404

MARVIN MANDEL
GOVERNOR

August 12, 1969

V Honorable Francis B. Burch
Attorney General
1200 One Charles Center
Baltimore, Maryland 21201

Dear Bill:

I have your letter of August 8, 1969, concerning the letter you received from Mr. Kerpelman.

I think both of us in past discussions have agreed that ultimately there would have to be legal decisions determining the State's interest in submerged lands, wetlands, and all of the other problems that you are currently reviewing. I think the sooner we have a decision the better it will be for the State and the citizens.

Therefore, in my judgment, I think we should reject Mr. Kerpelman's letter and proceed with the suit. Perhaps the decisions will be reached in this suit. If not, as soon as your opinion is ready, I would like to review this entire matter with you further.

Very truly yours,


Governor

*File
To*

McKee

August 8, 1969

Honorable Marvin Mandel
Governor of Maryland
State House
Annapolis, Maryland 21404

Re: Kerpelman v. Board of Public Works,
et al. - Circuit Court, Baltimore City

Dear Governor:

I am enclosing a copy of a letter we received on August 1st relating to subject litigation.

The compromise suggested in the letter would appear to be a matter for executive discretion, rather than legal determination. I might point out, however, the obvious fact that even if the instant suit should be dismissed, the same question could be raised by any one of 4,000,000 other taxpayers in this State.

We are of the view that Mr. Kerpelman's suit is not meritorious and we anticipate that the courts will render a decision favorable to the Board of Public Works.

As you know, we are now preparing an opinion, in great depth and detail, on the whole question of title to wetlands. I have previously expressed to you the thought that even when our research is completed some judicial determination should be reached on the question of the State's title, if any, to such lands. It might very well be that

Honorable Marvin Mandel

that determination could be had in the Kerpelman case. Therefore, the public interest might be better served if this suit were not dismissed by the plaintiff.

I would be happy to discuss this matter with you if you desire, at any time convenient to you.

Sincerely,

Francis B. Burch
Attorney General

gjc

Encl.

*Mr. Burch,
Mr. Perkins*

LEONARD J. KERPELMAN

ATTORNEY AT LAW
CHAMBERS AT
500 EQUITABLE BUILDING
CALVERT AND FAYETTE STS.
BALTIMORE, MARYLAND 21202

TELEPHONE SA 7-8700
RESIDENCE: NO 9-2112

CABLE: BOLTLEX

REGISTERED PATENT
ATTORNEY

July 29, 1969

Francis B. Burch, Esq.
Attorney General
1201 One Charles Center
Baltimore, Maryland 21201

Thos. P. Perkins III, Esq.
Mercantile Trust Building
Baltimore, Maryland 21202

Re: Elinor H. Kerpelman
v Board of Public Works,
James B. Caine, Inc., and
Maryland Marine Properties, Inc.
Circuit Court No. 2 of Baltimore City

Gentlemen:

In the above matter, it is our contention that the land title of the Defendants is bad.

Nevertheless, you dispute this, or some of you do, and I have heard rumors that financial difficulties ensue to some Defendants, in part, apparently due to pendency of this suit. I am sorry to hear of such difficulties being had by anyone.

I wish to suggest a compromise of the legal action on the following basis, which seems to me eminently practical of fulfillment:

1. The Plaintiff will dismiss her action upon passage through the Legislature, and signing by the Governor, of a Bill which will absolutely prohibit further bulkheading, filling or dredging of Wetlands anywhere in Maryland.
2. Pending passage of such a Bill in the next Legislature, the suit shall be "continued by stipulation", without prejudice to any party for the delay thereby entailed, should the Bill fail to pass for some reason.

Obviously, passage of the proposed Bill will require support of a number of Eastern Shore and Southern County Legislators. I trust that the times are such, that it would

LEONARD J. KERPELMAN

ATTORNEY AT LAW

CHAMBERS AT

500 EQUITABLE BUILDING

CALVERT AND FAYETTE STS.

BALTIMORE, MARYLAND 21202

TELEPHONE SA 7-8700

RESIDENCE: NO 9-2112

CABLE: BOLTLEX

REGISTERED PATENT
ATTORNEY

-2-

not be difficult to persuade any elected official of the worthiness of such a law.

Should this proposition for compromise coalesce, as I hope it will, into a working Agreement, the people of Maryland will be poorer by a Druid-Hill size loss of shoreland, very valuable to the wildlife of our endangered eco-system, it is true; but they will have guaranteed to them, as long as the Legislature is kept aware of the facts, that the cessation of the kind of "ill-considered" chipping and giving which has caused a loss of 83% of former wetlands in the San Francisco Bay Area, and 46% in Florida upon its Atlantic and Gulf Coasts, but which has fortunately, barely started in Maryland.

As I am led to believe that at the present moment, with the cooperation of the shore-county and southern Maryland delegations, the legislation in question could be passed, I would think that this means of terminating this suit and removing a cloud from the title to properties held not only by the Defendants, but by many small holders, should merit your serious consideration.

Above without prejudice, with a view to effecting a compromise.

Very truly yours,

LEONARD J. KERPELMAN

LJK/sz

August 6, 1969

Mr. G. Gordon Kirby
Clerk
Circuit Court No. 2
Court House
Baltimore, Maryland 21202

Re: Elinor H. Kerpelman v. Board of
Public Works of Maryland

Dear Mr. Kirby:

Please file the enclosed Demurrer and Memorandum
in Support of Demurrer in the above-entitled case.

Very truly yours,

Fred Oken
Assistant Attorney General

FO:imb

Enclosures

*Notes
2/12/69
[Signature]*

VENABLE, BAETJER AND HOWARD

**ATTORNEYS AT LAW
MERCANTILE TRUST BUILDING
BALTIMORE & CALVERT STS.
BALTIMORE, MARYLAND 21202**

TELEPHONE 752-6760
AREA CODE 301

PAUL S. BARBANES
LUKE MARBURY
STUART H. ROME
C. VAN LEUVEN STEWART
ALAN M. WILNER
ANTHONY M. CAREY
WILBUR E. SIMMONS, JR.
HENRY R. LORD
FREDERICK P. ROTHMAN
GEORGE C. DOUB, JR.
JOHN HENRY LEWIN, JR.
ALAN D. YARBRO
THOMAS J. KENNEY, JR.
NEAL D. BORDEN
ROBERT A. SHELTON
JACOB L. FRIEDEL
J. FREDERICK MOTZ
RICHARD W. EMORY, JR.
PHILIP J. BRAY

HARRY N. BAETJER
J. CROSSAN COOPER, JR.
JOHN HENRY LEWIN
H. VERNON ENEY
NORWOOD B. ORRICK
RICHARD W. EMORY
EDMUND P. DANDRIDGE, JR.
ARTHUR W. MACHEN, JR.
ROBERT M. THOMAS
FRANCIS D. MURNAGHAN, JR.
ROBERT R. BAIR
JACQUES T. SCHLENGER
CHARLES B. REEVES, JR.
WILLIAM J. MCCARTHY
RUSSELL R. RENO, JR.
FREDERICK STEINMANN
THEODORE W. HIRSH
THOMAS P. PERKINS, III
JOSEPH H. H. KAPLAN
BENJAMIN R. CIVILETTI
GERALD M. KATZ

July 22, 1969

JOSEPH FRANCE
COUNSEL



Jon Oster, Esquire
First Assistant Attorney General
Office of Attorney General
1200 One Charles Center
Baltimore, Maryland 21201

Re: Kerpelman vs. Mandel, et al

Dear Jon:

I enclose herewith copies of the following documents which I am filing today on behalf of Maryland Marine Properties, Inc. in the above captioned case:

- 1. Demurrer
- 2. Memorandum of Law
- 3. Request for Hearing.

Any thoughts or comments you might have would be most appreciated.

From your end of it, I hope that Bob Sweeney continues to succeed in his virtuoso performance of ducking service.

Best regards.

Sincerely,

Thomas P. Perkins III

TPPIII:agh
enclosures

State of Maryland



Board of Public Works
Annapolis, Maryland

July 18, 1969

Marvin Mandel
Governor
Louis E. Goldstein
Comptroller
John A. Eustemeyer
Treasurer
Andrew Heubeck, Jr.
Secretary

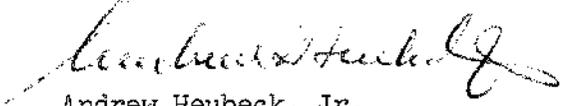
Honorable Francis B. Burch
Attorney General
State Law Department
One Charles Center
Baltimore, Maryland 21202

Dear Mr. Burch:

The members of the Board of Public Works were served with an Equity Subpoena on June 16, 1969, in the Governor's Office in Annapolis.

At the request of the Governor and the State Treasurer, I am enclosing the Subpoena served on them. I would appreciate it if you would take whatever action is necessary.

Very truly yours,


Andrew Heubeck, Jr.
Secretary

AH:lw



Mr. Oster



LOUIS L. GOLDSTEIN
COMPTROLLER OF THE TREASURY
STATE TREASURY BUILDING
P. O. BOX 466
ANNAPOLIS, MARYLAND 21404
268-3371

July 18, 1969

Jon F. Oster, Esquire
Assistant Attorney General
State Law Department
1200 One Charles Center
Baltimore, Md.

Dear Mr. Oster:

I am enclosing herewith a copy of the Bill of Complaint and Subpoena served on me in the case of Elinor H. Kerpelman vs. Honorable Marvin Mandel, etc., etal, in Circuit Court No. 2 - case #42686-A, docket 78-A, folio 142.

I would appreciate your keeping me informed on the progress of this case.

With kindest regards and best wishes, I am,

Cordially yours,

A handwritten signature in cursive script that reads "Louis L. Goldstein".

Louis L. Goldstein

LLG/EF

M. Shen
ELINOR H. KERPELMAN,

ELINOR H. KERPELMAN,

Complainant

v.

MARVIN MANDEL, et al.,

Defendants

IN THE
CIRCUIT COURT
NO. 2
OF
BALTIMORE CITY
78A/142/426867

MOTION TO DISMISS
BILL OF COMPLAINT
WITHOUT PREJUDICE

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Now comes Elinor H. Kerpelman, Plaintiff, by Leonard J. Kerpelman, her attorney, and says:

1. That heretofore, on September 16, 1969, hearing was held in open court on the above matter, and as a result thereof, an Order was signed sustaining the Demurrers and Preliminary Motions of the Defendants with leave to amend the Complaint within twenty days.
2. As a result of the hearing and proceedings heretofore had, Plaintiff believes that the suit more properly should be brought in the county where the land lies so as to avoid future controversy over the question of jurisdiction which the Defendants may otherwise raise.
3. Rather than amend the within proceedings, therefore, the Plaintiff believes it would be more desirable, and helpful to the litigants and the Court, to re-draw the Complaint, as a new Complaint, incorporating those changes which would otherwise have been incorporated herein in an Amended Bill of Complaint, and to file the same in the Circuit Court for Worcester County.

WHEREFORE the Plaintiff prays that her Bill of Complaint be dismissed "without prejudice".

AND, AS IN DUTY BOUND, ETC.

Leonard J. Kerpelman
Attorney for Complainant

I HEREBY CERTIFY that on this 25th day of September, 1969, a copy of the foregoing was mailed to Francis B. Burch, Esq., Attorney General, One Charles Center, Baltimore, Maryland 21202; Thomas Perkins, Esq., 1400 Mercantile Trust Building, Baltimore, Maryland 21202; Lee W. Bolte, Esq., Berlin, Maryland 21811; and Joseph Young, Esq., 900 First National Bank Building, Baltimore, Maryland 21202.

Leonard J. Kerpelman

Gentlemen:

Please call me if there is objection. We will then arrange a conference with Judge Perrott. LK.

SEP 30 1969

RECEIVED

M. Oken

ELEENOR H. KERPELMAN,
Plaintiff
v.
MARVIN MANDEL, et al.,
Defendants.

IN THE
CIRCUIT COURT
NO. 2 OF
BALTIMORE CITY
78A/142/42686A

PLAINTIFF'S MEMORANDUM
OF LAW

General. "Navigable".
High Water Mark.
Historical.

Maryland's ownership of its submerged lands under navigable waters derives from the English Common Law. Prior to the American Revolution, the Crown held all of the tidelands and beds of the navigable waters. After the American Revolution, title to these lands passed to the thirteen original states.

"Navigable" is an expansive term in Maryland. It has been held in the cases to include every part of stream or body of water, entire, from bank to bank, wherever the tide ebbs and flows. Wagner v. Mayor & City Council, 210 Md. 615. It includes water navigable by a flat-bottomed rowboat.

Maryland also takes an encompassing view of the question of whether the state's title runs to the tidal mean low water mark, or to the tidal mean high water mark - and Maryland has, along with many other states, opted for the latter, the high water mark. Day v. Day, 22 Md. 520 (1865); Patterson v. Gelston, 23 Md. 432 (1865); Cahill v. Mayor & City Council of Baltimore, 173 Md. 450 (1938).

Historical.

By a devious course of historic derivation, the owners of riparian land - shore land - seem to have some probably minor vested rights in the submerged lands before their properties. This they have very recently sought to expand into an unrestricted ownership which they apparently would like to contend stops only at the middle of the stream and includes, according to this new contention, the right to fill in to any extent desired, so as to make dry land where there was before navigable water. This, of course, has created the current wetlands dispute.

This odd contention is based on the fact that in Maryland, as in other states, there was a development in the last century and beyond of the right

to "wharf out" or otherwise acquire meaningful access to the deep part of the stream upon which land faced. This right has always, historically, had as its main purpose, the enhancement of that unique valuable feature of shoreland, access to the whole wide world by means of waterways navigation.

Also, there has developed (unfortunately, as far as conservationists are concerned) another exception in Maryland - legislatively - of allowing certain filling for commercial and, even according to a 1914 Court of Appeals view, "agricultural" purposes. This legislative exception, however, has never really been fully analyzed by a Court, particularly under the presently contended for circumstances, and this apparently is what has given bold hope to the developer defendants, and torn-out hanks of hair to citizens worried about the future of Chesapeake Bay.

II.

Statutes. The kind of title the State holds,

Article 54, Section 46, of the Maryland Code (passed in 1745), provides that improvements such as wharfs and docks shall pass with the land when sold. This was a matter which was unclear before passage of this section and shows that the legislature recognized that the shore owner did not own an alienable interest in submerged land in front of his property.

Article 54, Section 48, provides ... "No patent shall hereafter issue for land covered by navigable waters."

The purpose of the latter section was to prevent the state from selling out from under an improver, as had sometimes occurred, those wharfs or other structures which may have been constructed over the bed of the stream, in furtherance of the shore owner's right to reach deep water over submerged land which he did not own a fee interest in.

Shively v. Bowlby

The occurrence of such statutes as these was not peculiar to Maryland, as may be expected. As was said in the leading case of Shively v. Bowlby, ^{38 W. Ed. 381} U.S., by the Supreme Court in 1893:

"The governments of the several colonies, with a view to induce persons to erect wharves for the benefit of navigation and commerce, early allowed the owners of lands bounding on tidewaters greater rights and privileges in the shore below high water mark than they had in England. But the nature and degree of such rights and privileges differed in the different colonies, and in some were created by statute, while in others they rested upon usage only."

The Court then reviewed the situation in all the original states and said:

"In Maryland, the owner of land bounded by tidewater is authorized, according to various statutes beginning in 1745, to build wharves or other improvements upon the flats in front of his land and to acquire a right in the land so improved. Casey v. Incees, 1 Gill 430..."

Agriculture

The unfortunate "agricultural" language referred to before appears in Hess v. Muir, 65 Md. 586 (1886), and in Hudson v. Nelson, 122 Md. 330 (1914):

"Farming and commercial interests are promoted by the privilege (of extending improvements into the water), and to encourage the development of these was the main object of conferring it."

These great boons and improvements of the 1886 and 1914 cases cause environmentalists to shudder today. Land, for farming, particularly in small plots, is not at such a premium as it once was. The greater premium now, without question, is on wetlands for their food-producing and environment-protecting functions. Time was when people were lazily unconcerned about such matters. But today, it is an aware public which breathlessly watches Liza crossing the ice and hopes that Simon Legree is not called Maryland Court of Appeals. At any rate, in Hess v. Muir and Hudson v. Nelson, the question at issue was not really the filling in of large tracts, and using the shoreland as an excuse to do things which are usually done on dry land. The Court was talking about matters which, in fact, were not before it and was, therefore, rather obviously delivering an "obiter dictum".

It is hoped that what will be convincing will be the language in the old and leading cases, such as Shively v. Bowlby, quoted above. In that case, Mr. Justice Gray, speaking for the United States Supreme Court, described the ownership which was vested in the King, of yore, by virtue of his sovereignty, and which passed to the states and/or the United States in 1783 upon the adoption of the federal constitution. The Court said, using language colorful, quaint, broad, convincing, and libertarian, not to say biologically sound:

"By the Common Law, both the title and the dominion of the sea, and the rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their natures, for highways of navigation and commerce, domestic and foreign, and

for the purpose of fishing by all the King's subjects. Therefore, the title, jus privatem, in such lands, as of waste or unoccupied lands, belongs to the King as the sovereign; and the dominion thereof, jus publicam, is vested in him as the representative of the nation and for the public benefit.

..."But though the King is the owner of this great waste, and as a consequence of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof, yet the Common People of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places, creeks or navigable rivers, where either the King or some particular subject hath gained a propriety exclusive of that common liberty. (Quoting here Lord Hale in an ancient English document): ...'Yet, the people have a public interest, a jus publicam, of passage and re-passage with their goods by water, and must not be obstructed by nuisances for the jus privatem of the owner or proprietor, who is charged with and subject to that jus publicam which belongs to the King's subjects; as the soil of a highway is, which, we know in point of property, it may be a private man's freehold, yet it is charged with the public interest of the people, which may not be prejudiced or damnified.'

"By recent judgments of the House of Lords...it has been established in England that the owner of land fronting on a navigable river in which the tide ebbs and flows has a right of access from his land to the river. ...The right thus recognized, however, is not a title in the soil below high water mark, nor a right to build thereon, but a right of access only, analagous to that of an abutter on a highway."

Justice Gray then went on to say that the above Common Law of England had been "at the time of the immigration of our ancestors, so - and is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several colonies and states, or by the Constitution and Laws of the United States. Justice Gray said further, quoting a former Opinion by Chief Justice Taney:

"The country mentioned (meaning submerged lands) was held by the King as the representative of the nation and in trust for them. In his hands they were intended to be in trust for the common use of the new community about to be established, a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shellfish as floating fish, and not as private property, to be parceled out and sold, ...and in the judgment of the Court, the lands under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; and were to be held by him in the same manner and for the same purposes that the navigable waters of England, and the soils under them, are held by the Crown." (Taney was here referring to a grant which later became New Jersey.) "When the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights, since surrendered by the Constitution, to the general government." (Baph. supp.)

Mr. Justice Gray went on to further speak of an earlier Supreme Court case, Smith v. Maryland, 59 U.S. 18, in which Mr. Justice Curtis, in "affirming the

right of the State of Maryland to protect the oyster fishery within its boundaries", said:

"Whatever soil...is the subject of exclusive propriety and ownership belongs to the state on whose maritime border and within whose territory it lies. ...But this soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shellfish as floating fish...." Smith v. Maryland, 59 U.S. 18.

Likewise, the great Declaration of Rights of Maryland provides in Article 6, that "Legislative and Executive officers are trustees of the public."

III.

Comments

Fortunately, privileges specially granted by the state are traditionally subject to strict construction against the grantee. Bostick v. Smoot Sand & Gravel Corp., 154 F.Sup. 744 (D.Md. 1957).

No Maryland court has had presented to it directly, however, the question of the extent to which a shoreside owner may improve property out over the water, or into the water, by bulkheading and filling or, for example, by building a whole housing development down at Assawoman Bay. Logic would seem to dictate that the provisions of Section 46 of Article 54 were not meant to provide for housing developments.

Also causing an abundance of difficulty is Section 15 of Article 78A, which places unfettered (except as all statutes are fettered by the constitutions of the state and of the United States), and boundless discretion in the Board of Public Works, by providing:

"Any real or personal property in the State of Maryland...and any legal or equitable rights, interests, privileges, or easements in, to, or over the same, may be sold, leased, transferred, exchanged, granted or otherwise disposed of to any person, firm (or) corporation...for a consideration adequate in the opinion of the Board of Public Works...(This) shall include the inland waters of the state and land under said waters..."

Well possibly, if the state had good title to give in the first place. Shively v. Bowlby shows it did not, however. Besides, is not the seemingly limitless power of the Board of Public Works, not only limited constitutionally, but also limited by Section 48 of Article 54, providing that "no patent...shall hereafter issue for land covered by navigable waters", which section was last re-enacted in 1955, in the same form in which it was first enacted in 1862? And

what about Article 6 of the Declaration of Rights which provides that the executive officers of a state are trustees of the people? Can a trustee give away trust property?

Finally, and yet a point of almost pristine novelty in the law; What about the rights of the public to the continuation of a viable environment? This latter, many believe, is the most important question undecided. It is not only undecided in Maryland, it is undecided in the federal court system, and it is undecided by the Supreme Court. It seems conservatively prudent to believe that what with a public and courts newly aware of the dangers to the environment which are imposed by modern-day population pressure, industrial expansion, land gobbling of various kinds, and in this case by water gobbling, that the Court will be sympathetic to new arguments categorizing these public interests as being encompassed already in the familiar "life, liberty and property" so long protected from encroachment by the states, as well as by Congress by virtue of the 14th Amendment.

In short, it seems that the time is propitious for the court to declare itself in favor of living and breathing, and in favor of a little peace and recreation besides.

Leonard J. Kerpelman
Attorney for Plaintiff

Specificity of Real Property
and the Obligations Upon the
Trustee.

An owner's right to his specific real property has long been recognized in the law. The remedy of "specific performance" grew out of the recognition of the uniqueness of land. Why should subaqueous land, held in trust by the state for the benefit of all the people, be subject to any lesser standard of protection? Indeed, a fiduciary is bound to an even greater effort at protection and the public's right to the ownership of its submerged realty cannot be alienated by the state. The state in its function as trustee may not weigh and balance the benefits between the whole public and riparian neighbors or anyone else. Such a test would be a breach of trust. The trustee may only consider: "What use of this property will best benefit the beneficiaries within the limits of the purpose of the trust?" This is classic trust law, and any failure to apply it, no matter how "minor", is another breach by which the public has been cheated.

"Insubstantiality" of the acreage
under consideration.

In the mistaken rationalization that many of these land transfers are "insubstantial", great irreparable harm has occurred to the very property rights sought here to be protected. The Department of the Interior, for example, has since 1965, received more than 20,640 applications for dredge and fill operations.* This number provides a clue to the magnitude of destruction suffered by the nation's irreplaceable and non-renewable estuarine resources.

Statistics.

It has been disclosed* that because of the cumulative effect of generally small dredge and fill operations, the United States has now lost over 7% of its total estuarine areas, about 750,000 acres, as important fish and wildlife habitats: the East Coast, including Florida - 165,000 acres; the Gulf Coast, excluding Florida - 71,000 acres; the West Coast - 261,000 acres with the State of California alone suffering a 67% loss of vital estuaries!

Scientific data indicates that without the estuary, the aquatic environments would be reduced to lifeless biological deserts. A Symposium on Estuarine Fisheries, American Fisheries Society, September 1964.

By small stages, and by miniscule applications, for "unimportant" filling, 160 square miles of the shoal water area of San Francisco Bay has been filled in - 35% of the irreplaceable productive area of that Bay.¹

The social and economic problems inherent in the development of an estuarine bay was described by Roland F. Smith, Chairman of the Estuarine Fisheries Committee of the American Fisheries Society at its 94th annual meeting. "Concern for our estuarine fishery resources", he stated, "is more than a sentimental attempt to preserve a part of our natural heritage doomed by the materialistic demands of a rapidly expanding and affluent population. At least 64% of our nation's commercial fish and shellfish and most marine sports species inhabit the estuarine environment during all or part of their life cycle. Most of these represent top-quality food species or highly-prized sport fish... The contribution of these estuarine fishery resources to our general health and economic well-being has increased at a far greater rate than was predicted 20, 10, even 5 years ago. Current estimates of future use and demands may prove to be equally conservative. The fact remains that for most estuarine fishery resources our major problem will be to provide an adequate supply in the face of increased demands and dwindling habitat."²

* Congressional hearings on "Permit for landfill in Hunting Creek, Virginia", Committee on Government Operations, 1968.

¹ Estuaries and Their Natural Resources, Hearing Before the Committee on Commerce, 90th Congress, 2nd Session.

² Ibid.

An unreasonable burden has fallen on the public in protecting their property rights in the environmental benefits and necessities which are so continuously threatened by industry, and economically powerful forces in the economy, or equally powerfully situated as to lobbying in legislatures, and who cannot be defeated by the ordinary citizen without very direct assistance accorded to him in his courts.

The direction which this assistance might take, is exemplified in Berman v. Parker, 348 U.S. 26, 99 L.Ed. 27, an urban renewal case, in which Justice Douglas speaking for a unanimous court, and discussing the right of a state to clear slums, said:

"An attempt to define the reach (of the police power) or trace its outer limits is fruitless...Public safety, public health, morality, peace and quiet, law and order, - these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."

While the court was speaking of the police power, the same can be said, if a court will have the willingness to say it, concerning the beleaguered and vital rights which the citizen has to the uninterrupted enjoyment of a healthful, pleasureable, productive, economically viable environment.

In the Berman case, the court also stated, at page 33:

"We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary."

More Shively v. Bowlby

"Some passages in the Opinions in certain cases relied on by the learned counsel for the Plaintiff in error, are cited as showing that the owner of land adjoining any navigable water, whether within or above the ebb and flow of the tide has, independently of local law, the right of property in the soil below high water mark, and the right to build out wharfs so far at least as to reach water really navigable.

"But the remarks of Mr. Justice Clifford in the first of those cases, upon which his own remarks in the second case, and those of Mr. Justice Miller in the third case were based, distinctly recognized the diversity of laws and usages in the different states upon this subject, and went no further than to say that wharves, piers and landing places, 'where they conform to the regulations of the state', and do not extend below low water mark, have never been held to be nuisances, unless they obstruct the paramount right of navigation; that the right of the riparian owner to erect such structures in the navigable waters of the Atlantic states has been claimed, exercised and sanctioned from the first settlement of the country to the present time; that 'different states adopted different regulations upon the subject, and in some, the right of the riparian proprietor rests upon immemorial local usage'; and that 'no reason is perceived why the same general principle should not be applicable to the lakes, so far as to permit the owner of the adjacent land to build out as far as where the water first becomes deep enough to become navigable'. 66 U.S. 31, 32. And none of the three cases called for the laying down or defining of any rule independent of local law or usage, or of the particular facts before the court.

"IX. But Congress has never undertaken by general laws to dispose of such lands, and the reasons are not far to seek.

As has been seen, by the law of England, the title in fee, or jus privatum, of the King or his grantee was, in the phrase of Lord Hale, 'charged with and subject to that jus publicum which belongs to the King's subjects' or, as he elsewhere puts it, 'is clothed and superinduced with a jus publicum, wherein both natives and foreigners in peace with this kingdom are interested by reason of common commerce, trade and intercourse.' Hargreave's Law Tracts, 36, 34. In the words of Chief Justice Taney, 'The country discovered and settled by Englishmen was held by the King in his public and regal character as the representative of the nation, and in trust for them; and the title and dominion of the tidewaters and of the soil under them, in each colony, passed by the Royal Charter to the grantees, as 'a trust for the common use of the new community about to be established; and, upon the American Revolution, vested absolutely in the people of each state 'for their own common use, subject only to the rights since surrendered by the Constitution to the general government.' Martin v. Waddell, 41 U.S. 16 PET. 367, 409 to 411. As observed by Mr. Justice Curtis, 'this soil is held by the state not only subject to, but in some sense in trust for, the enjoyment of certain public rights'. Smith v. Maryland, 59 U.S. 18, HOW 71, 74. The title to the shore and lands under the water, said Mr. Justice Bradley, 'is regarded as incidental to the sovereignty of the state - a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery'. Hardin v. Jordan, 140 U.S. 371, 381.

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands...may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, be chiefly valuable for the public purposes of commerce, navigation, and fishery, and for the improvements necessary to secure and promote these purposes, they shall not be granted away during the period of territorial government; but...shall be held by the United States in trust for the future states and shall vest in the several states, when organized...with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, they shall not be disposed of piecemeal to individuals as private property but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state after it shall have become a completely organized community." (Emph. supp.)

And, at page 58:

"The conclusions from the considerations and authorities above may be summed up as follows:

"Lands under tidewaters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title and the control of them are vested in the sovereign for the benefit of the whole people.

"At common law, the title and the dominion in lands flowed by the tide, were in the Kings, for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the Royal Charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states, within their respective borders, subject to the rights surrendered by the Constitution of

the United States.

"Upon the acquisition of a territory by the United States, whether by cession from one of the states or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory."

Another Leading Case

The trust principle was recognized by the United States Supreme Court again, in the landmark case of Illinois Central Railroad Company v. Illinois, 146 U.S. 1018 (1892), and has been cited again and again in dozens of cases, perhaps even more than a hundred. The Court said, at page 1042:

"That the state holds the title to the lands under the navigable waters...in the same manner that the state holds title to soils under tidewater by the common law, as we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty to fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in the commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the state may grant parcels of the submerged land; and so long as disposition is made for such purposes, no valid objections can be made to the grants. It is grants of parcels of land under navigable waters that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and water remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust of the public upon which such lands are held by the state." (Emphasis supp.).

The Court went on to say that general language in some of the previous cases was expressive of absolute ownership by the state of the lands under navigable waters, "irrespective of any trust as to their use and disposition, (but these cases) must be read and construed with reference to the special facts of the particular cases." *Ib.* at 1043.

The Better Cases - The Trust Theory.

This is so. However, the better reasoned cases discuss the trust theory at length and recognize that when the Constitution of the United States became operative, the several states continued to hold title to beds of all waters within their borders which were navigable, not for disposition to individual ownership, but in trust. See Shively v. Bowlby, 152 U.S. 11, *supra.*, Brickell v. Trammell, 82 S.221 (Fla. 1919); Apalachicola Land & Development Co. v. McRae, 98 S.505 (Fla. 1923).

In Brickell, *supra.*, at page 226, the Court said, for example:

"The trust in which the title to the lands under navigable waters is held is governmental in nature and cannot be wholly alienated by the states. For the purpose of enhancing the rights and interests of the whole people, the states may by appropriate means grant to individuals limited privileges in the lands under navigable waters, but not so as to divert them or the waters thereon from their proper

use for the public welfare, or so as to relieve the states respectively of the control and regulation of the uses afforded by the land and the waters, or so as to interfere with the lawful authority of Congress. (Emph. supp.)

..."The rights of the people of the states in the navigable waters and the lands thereunder, including the shore or space between ordinary high and low water marks, relate to navigation, commerce, fishing, bathing, and other easements allowed by law."

In *in re Waterfront on North River and City of New York*, 205 N.Y. Supp. 56, the Court said:

"Lands under navigable waters are owned by the state or city in trust for the public, and no diversion of ownership or use is permissible, except in aid of commerce, navigation, or for public purpose."

An interesting case is *State v. Cleveland P R Company*, 113 N.E. 677, in which at page 681, the Court said:

"As shown, the state holds the title to the subaqueous land as trustee for the protection of public rights. ... (T)he littoral owner for the purposes of navigation, should be held to have the right to wharf out to the line of navigability as fixed by the general government, provided he does not interfere with public rights. Otherwise, through the mere absence of legislation by the state, the supreme utility and value of navigable waters - navigation and commerce - would be defeated. Whatever (the littoral owner) does in that behalf is done with knowledge on his part that the title to the subaqueous soil is held by the state as trustee for the public, and that nothing can be done by him that will destroy or weaken the rights of the beneficiaries of the trust estate. ..."

This case points out starkly, the proper view and purpose of regulations giving littoral owners the right to make improvements out to the "wharf line" or "bulkhead line", which is spoken of with great abandon in many Maryland cases, when the Court was not under any pressure to consider that in the future its words might be considered to mean that a riparian (or littoral) owner might be claimed to have the right to destroy a part of the body of water and deprive the public of its utility. In all of those Maryland cases, the littoral owner was enhancing the utility of the public waters, and not interfering with the trusteeship ownership which the state held, but was making the land more available for navigational access and commerce. The cavalier Maryland dicta speaking of agricultural uses, however, cannot be reconciled with this trust theory, and this must be so recognized by any realistic person facing the facts which the Maryland court will be asked to face. If the Maryland court wishes to slither out, supposedly it may do so by falling back on the "agricultural" language, but it certainly could not do so in very good conscience it would seem. Dicta, as is well recognized in the law, is not binding and merely amounts to a suggestion of extension of the law, and this principle in question grew up from the well-recognized proposition that when a court is not required to decide a matter under the pressing urgency of present circumstances, as elicited in the facts in the case before it, it could well get into treacherous ground and be tripped up by later facts in which the application of a general principle enunciated as dictum did not fit at all, and did not work justice - but injustice. Hence, the harsh reluctance of courts to be bound by statements in earlier cases which were not necessary to the decision in the cases - or dicta. So here.

Likewise, Section 45 of Article 54, providing:

"The proprietor of land bounding on...navigable waters...shall be entitled to all accretions to said land...whether...formed... by natural causes or otherwise, in like manner and to like extent

as such right may or can be claimed by the proprietor of land bounding on water not navigable."

Such statutory language can conceivably be interpreted, can readily be claimed to give, the right to build up ocean front property, for example, all the way from Ocean City out to within sight of Liverpool. But on the basis of the kind of title which Maryland has in submerged lands under navigable waters, it should be clear, it seems, that the Legislature could not give away that which it, or the state, did not own. It cannot give away a fee title as it did not own a fee title. According to Shively v. Bowlby, supra., and the reasoning therein, many times followed, neither the King in olden time could give away lands which were jus publicum, nor could the state, which as shown in Shively v. Bowlby, held the same kind of title, give away a fee interest. It could not give away an unfettered, unbounded interest of ownership of lands under navigable waters.

Should Maryland decide otherwise, it would be among a small minority of states which have, in a small minority of cases, mistakenly relying on dictum and misinterpretation, acted contrary to what is clearly becoming an extremely important public interest in our modern, crowded, polluted world.

An "Opinion" (so-called)
of the Attorney General.

Besides, there is certainly a contrary argument, embodied in an examination of the noun "accretion" in the above Article 54, Sec. 45. "Accretion" is 'a word of art' in the law of waters, which properly describes the gradual, natural, process of the deposit of sediment along the shore, thereby building "fastland". Black's Law Dictionary, pages 36, 37; 1A Words and Phrases 422 (1964). The statutory phrase "accretions to said land by the recession of said water" is, in fact, an incorrect use of the noun "accretion", for the exposure of land by gradual subsidence of water is properly called "dereliction" (sometimes shortened to "reliction"), a phenomenon different from accretion although generally having the same legal consequences. In any event, it seems well settled that accretion is a gradual process which, although sometimes expanded to include improvements, or fill, put in front of a riparian owner's property by the acts of third persons, cannot without gross distortion define the deliberate action of a riparian owner dumping fill overboard until the bottom in front of his property emerges as fastland.¹

In the Opinion of the Attorney General found at page 452 of Volume 50 of Attorney General's Opinions (1965) says, at page 461:

"Nor is (accretion) a right, as we see it, to thrust one's acreage into open water. This conclusion takes full account of the statutory phrase (Section 45, Article 74) "formed or made by natural causes or otherwise...".

But unfortunately, what the Attorney General had done was to think wishfully, as Attorney Generals are wont to do, when they know the boss wants a certain conclusion.

In actual fact, however, the "Opinion" is not specifically, nor directly, substantiated by cases in Maryland interpreting the unique beneficence of the Maryland Statute to private entrepreneurs.

Better thinking seems to be along the line of relying on the fact that neither the King nor the State of Maryland could give away that which it held only in trust, or following another line of reasoning, that the Statute was meant to affirm good title in expensive wharves which riparian owners were being encouraged to construct, for before the statute, they could not have been sure that in building out over state waters, the state would not assert

¹. Pirated from Mr. Redden's "Attorney General's Opinion." Thanks, Roger.
Vol. 50, p. 459.

its own (the people's) rights, or give rights in the stream or in the bed of the stream to others, defeating the riparian's capital expenditure.

Or, again, that the Legislature cannot give away the right of control over navigable waters which had been granted to the United States by Maryland's ratification of the federal constitution.

Other Cases Under
the Trust Theory.

"The state has the power to permit a railroad company to build and operate a railroad over tide and submerged lands to a connection with deep water navigation, as such a disposition of the public land held in trust for purposes of navigation and commerce would be in furtherance of the trust and valid." Koyer v. Minor, 156 P. 1023.

"Tideland may be devoted to any use not inconsistent with the public trust; neither the construction of piers, groins, and breakwaters improving the harbor, nor improvements by way of a public park to develop the beach area, are violative of the public trust subject to which the state holds the land." People v. Hecker, 4 Cal. Repr. 334 (Cal. 1963).

"The doctrine that the state holds beds under navigable waters in trust, prevents the state from making a substantial grant of lake beds for purely private purposes; even for a public purpose the state cannot change an entire lake into dry land or alter it so as to destroy its character as a lake; the doctrine does not prevent minor alterations of natural boundaries between water and land." State v. Public Service Commission, 81 NW 2d, 71 (Wis. 1965.)

Lands covered by navigable waters cannot be granted.

Swan Island Club, Inc. v. White, DCNG 114 F.Supp. 95. Affirmed OCA 4, Swan Island Club, Inc. v. Yarbrough, 209 F2d 698 (1954). This case is a modern reappraisal and affirmance of a trust doctrine in this circuit.

65 CJS, Navigable Waters, Section 99(3), page 313 et seq.:

"The power of the state to dispose of lands under navigable water is limited by the public trust in which such lands are held, and the state's power of alienation is subject to the paramount rights of the public, including the right of navigation. The state cannot by grant...abdicate, surrender or delegate its trusteeship... or surrender entirely its control over navigable waters. Citing many cases.

Constitutional Arguments.

The Plaintiff further argues that the state, by the attempted sale of part of the Bay waters, with knowledge of the Defendant Developers' intention to drain or fill the land under these waters and erect trailer park developments, not in aid of navigation, has denied to the Plaintiff and the class she represents, public rights, privileges and immunities protected by the 5th, 9th and 14th Amendments of the Constitution of the United States.

And the 10th,

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

"The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the states or to the people." U.S. v. Sprague, 282 U.S. 716, 733 (1931).

It is the contention of the Plaintiff in the suit that the property which was here turned over to private developers was not owned by the state in a capacity in which it could have disposed of it for such purposes.

Conclusion.

It certainly seems reasonable to assume that the property of all - the air, the water, fisheries, recreationally valuable areas - will have to be protected in the name of all, if all are not to be doomed bit by bit. Historically, legislatures and congresses have been unresponsive to this need, and have come in on the side of the public only with great reluctance. The courts, which have protected voting rights, civil rights, property rights, and personal rights of individuals against rapacious governmental and private tyrannies of various sorts would seem, in our system, to be the primary bulwark to be depended on, particularly a court of Equity.

I HEREBY CERTIFY that on this 12th day of September, 1969, a copy of the foregoing was mailed to Francis B. Burch, Esq., Attorney General, One Charles Center, Baltimore, Maryland 21201; Thomas Perkins, Esq., 1400 Mercantile Trust Building, Baltimore, Maryland 21202; and Lee W. Bolte, Esq., Berlin, Maryland 21811.

Leonard J. Kerpelman



ELINOR H. KERPELMAN : IN THE
Plaintiff : CIRCUIT COURT NO. 2
v. :
HON. MARVIN MANDEL, Governor, : OF
et al : BALTIMORE CITY
Defendants : 78A/142/42686A
:

O R D E R

The motion raising preliminary objection filed by James B. Caine, Inc., one of the Defendants, having been read and considered, counsel having been heard in oral argument, it is this day of September, 1969,

ORDERED, that the motion raising preliminary objection is granted with leave to the Plaintiff to file an amended bill of complaint within twenty (20) days.

Judge

Mr. Oken
Miss Bull

LEONARD H. KERPELMAN

v.

BOARD OF PUBLIC WORKS,
et al.

'
'
'
'

IN THE
CIRCUIT COURT
NO. 2 OF
BALTIMORE CITY

MOTION FOR HEARING
IN OPEN COURT

Mr. Clerk:

I have received notice of hearing upon the Demurrer in the above entitled matter for September 16, 1969, and I hereby request that said hearing upon Demurrer be heard in open court.

Leonard J. Kerpelman
Attorney for Complainant

I HEREBY CERTIFY that a copy of the foregoing Motion for Hearing was mailed this 30th day of August, 1969, to Fred Oken, Assistant Attorney General, 1201 One Charles Center, Baltimore, Maryland, to Thomas B. Perkins, III, Esq., Mercantile Trust Bank Building, Baltimore, Maryland, and to Joseph H. Young, Esq., 900 First National Bank Building, Baltimore, Maryland.

Leonard J. Kerpelman
Attorney for Complainant

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RECEIVED

Mr. Clerk

ELINOR H. KERPELMAN	:	IN THE
	:	
Plaintiff	:	CIRCUIT COURT NO. 2
v.	:	
	:	OF
HON. MARVIN MANDEL, Governor,	:	
et al	:	BALTIMORE CITY
Defendants	:	
	:	78A/142/42686A

MOTION TO ENTER APPEARANCE

MR. CLERK:

Please enter the appearance of Sanford and Bolte as co-counsel for James B. Caine, Inc., one of the Defendants.

Sanford and Bolte

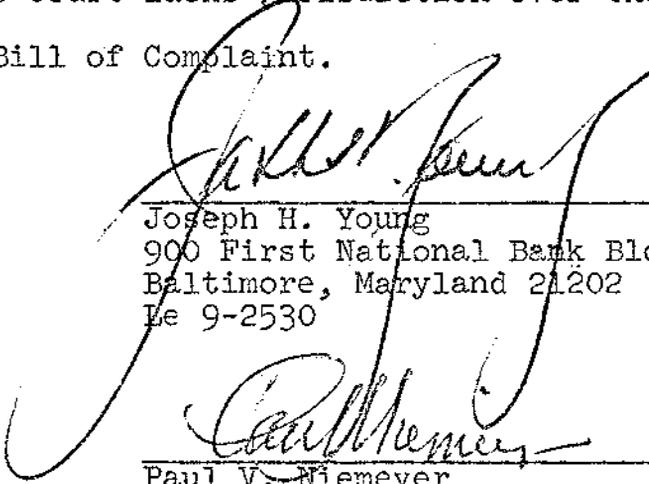
Lee W. Bolte
Berlin, Maryland 21811
641-0700

I HEREBY CERTIFY, that on this 13th day of August, 1969, a copy of the foregoing Motion was mailed to Francis B. Burch, Esq., Attorney General, One Charles Center, Baltimore, Maryland 21201; Leonard Kerpelman, Esq., 900 Light Street, Baltimore, Maryland 21230; and Thomas Perkins, Esq., 1400 Mercantile Trust Building, Baltimore, Maryland 21202.

ELINOR H. KERPELMAN, : IN THE
Plaintiff : CIRCUIT COURT NO. 2
vs. : OF
HON. MARVIN MANDEL, : BALTIMORE CITY
Governor, et al. :
Defendants : Docket: 78A
Folio: 142
Case #: 42686A

MOTION RAISING PRELIMINARY OBJECTION

James B. Caine, Inc., one of the defendants, by Joseph H. Young and Paul V. Niemeyer, its attorneys, moves this Court pursuant to Rule 323(a)(1) of the Maryland Rules for an Order dismissing the Bill of Complaint filed herein by Eleanor H. Kerpelman, Complainant, and as grounds for its Motion alleges that this Court lacks jurisdiction over the subject matter of said Bill of Complaint.

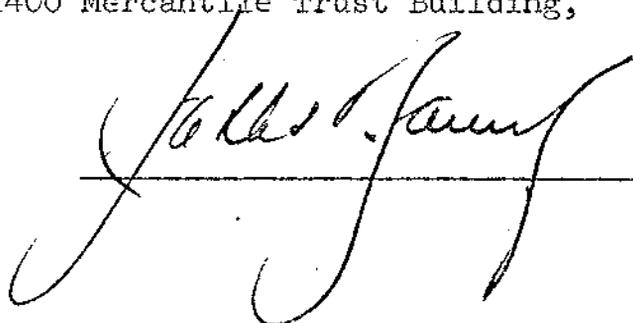


Joseph H. Young
900 First National Bank Bldg.
Baltimore, Maryland 21202
Le 9-2530



Paul V. Niemeyer
900 First National Bank Bldg.
Baltimore, Maryland 21202
Le 9-2530

I HEREBY CERTIFY that a copy of the foregoing Motion was this 12th day of August, 1969, mailed to Francis B. Burch, Esq., Office of the Attorney General, One Charles Center, Baltimore, Maryland 21201; to Leonard Kerpelman, Esquire, 900 Light Street, Baltimore, Maryland 21230; and to Thomas Perkins, Esquire., Venable, Baetjer & Howard, 1400 Mercantile Trust Building, Baltimore, Maryland 21202.



ELINOR H. KERPELMAN,	:	IN THE
Plaintiff	:	CIRCUIT COURT
vs.	:	NO. 2
HON. MARVIN MANDEL,	:	OF
Governor, et al,	:	BALTIMORE CITY
Defendants	:	Docket: 78A
		Folio: 142
		Case #: 42686A

MEMORANDUM IN SUPPORT OF PRELIMINARY OBJECTION

The Bill of Complaint filed herein alleges essentially that the Board of Public Works (hereinafter referred to as the Board) conveyed certain lands of the State of Maryland to the other defendants for "totally inadequate and insufficient consideration." On this fundamental allegation the complainant wishes this Court to question the judgment of the Board, alleging that because complainant's judgment differs from that of the Board's, the transaction should be set aside.

This is not a complaint alleging the unconstitutionality of a statute; this is not a complaint alleging that the Board acted in violation of the Constitution, any statute or the authority granted to it--to the contrary the allegations show the Board acted pursuant to authority conferred on it. This is a complaint by a taxpayer who disagrees with the judgment of the Board, which judgment the Board was authorized by law to exercise. By the complaint, the complainant asked this court to substitute its judgment for the exercise of judgment by the Executive branch of government.

One of the defendants, James B. Caine, Inc. (Caine) contends that this court should dismiss this case as it has no jurisdiction over the subject matter.

One of the very foundations of the Maryland State government is the separation of powers. Art. 8, Decl. of Rights ("That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.") In accordance with this doctrine, the Legislature has delegated to the Executive and in particular to the Board (Art. 78A, §16 of the Maryland Code) certain powers of execution with which it is submitted, this Court should not and would not interfere, so long as the execution does not go beyond the authority delegated.

In Duvall v. Lacy, 195 Md. 138 (1950), the Court of Appeals reiterated this doctrine at 149 as follows:

"But there is no authority in the judiciary to control the members of the executive department in carrying out their duties, so long as no plain violation of the Constitution or the law is found to exist."

This is especially true when the activities of the Executive are pursuant to full discretionary authority delegated upon it. When this is the case, the questions arising from the exercise of this discretion are purely political in nature. The Court of Appeals in Maryland Committee v. Tawes, 228 Md. 412, 426 (1962) stated that political questions are "questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the Legislative or Executive branches of the government. . . .It is unquestionably true that the courts will not determine purely

political questions."

In the particular case before this Court the complainant seeks to review the full discretionary authority delegated to the Board of Public Works for the sale of certain properties of the State. The complainant does not challenge the authority granted nor does the complainant indicate that the sale was without authority. Rather the complainant wishes to attack the adequacy of consideration which is one of judgment reserved to the Board exclusively. Art. 78A, §16 provides that the Board may sell properties of the state if, in its opinion, the consideration is adequate. This is indeed a broad delegation, but again the suit does not attack the delegation (an action of which this Court might have jurisdiction over the subject matter.)

A general discussion of the doctrine of separation of powers and the restraint which the Courts exercise in reviewing activities of the Executive branch of government is fully discussed in Magruder v. Swann, 25 Md. 173 (1866). In this discussion the Court stated at 211-12:

"Where the act to be done [by the executive branch] requires judgment and discretion [as opposed to a mere ministerial duty] in the officer against whom the mandamus is prayed it will be refused.

The cases cited were used to sustain the position that the Executive in his political or discretionary powers was beyond all judicial interference, not to sanction the application of the principle to the facts of each case. Although it was said in that case [reference is made to Miles v. Bradford, 22 Md. 170] that the Governor bears the same relation to the State that the President does to the United States, and in the discharge of his political duties is entitled to the same immunities, privileges and exemptions. It is nowhere said that the President

or Governor, in the discharge of mere ministerial duties would be exempt from judicial process."

In Miles v. Bradford, 22 Md. at 184, the Court of Appeals recognized that the separation of powers in Maryland was similar to the separation of powers in the federal government and applied a quote from Chief Justice Marshall in the case of Marbury v. Madison, 1 Cranch 145:

"the President is invested with certain political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience."

The Court pointed out that to make the Executive accountable to the courts would be in effect to deprive the state of a "co-ordinate, separate, distinct and independent department of government."

Needless to show by any extensive memorandum, the rule as set forth hereinabove is the same with respect to the separation of powers in the federal government. For example in Clackamas Company v. McKay, 226 F.2d 343 (1955) cert. denied, 350 U.S. 904, the Court of Appeals for the D.C. Circuit stated at 345-46:

"When the U.S. acquires, by eminent domain or otherwise, a tract of land in a State, it becomes the owner, and thereafter disposition is within the unfettered discretion of the Congress.

. . .

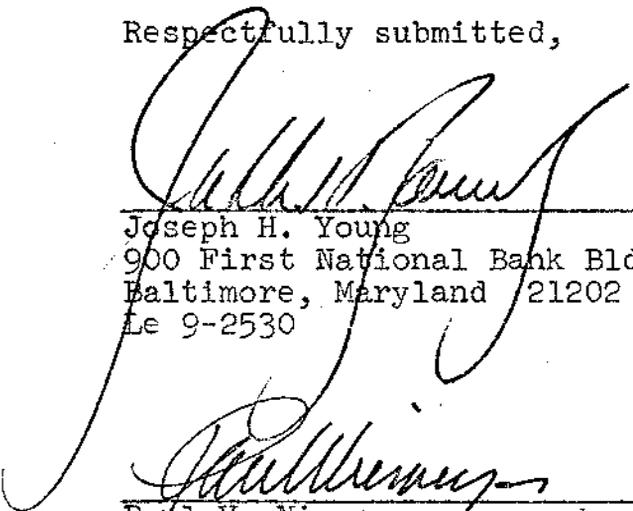
And of course the Courts cannot interfere with the administration of public property as arranged by the Congress and the Executive, so long as constitutional boundaries are not transgressed by either branch or statutory ones by the latter."

See also D.C. Federation of Civic Association v. Airis, 275 F. Supp. 533 (1967); Frost v. Garrison, 201 F. Supp. 389 at 391 (1962) (where the Court stated: "This Court cannot assume a wisdom superior to that of the Executive or Legislative Department with respect to the disposition of animals in Yellow-

stone National Park for the protection or benefit of such park."); Ainsworth v. Barn Ballroom Co., 157 F.2d 97 (1947); Dow v. Ickes, 123 F.2d 909 (1941), cert. denied, 315 U.S. 807, rehearing denied, 315 U.S. 830; and, Ducker v. Butler, 104 F.2d 236 (1939);

Accordingly, Caine contends that this Court has no jurisdiction over the subject matter of this action and that therefore the complaint should be dismissed.

Respectfully submitted,

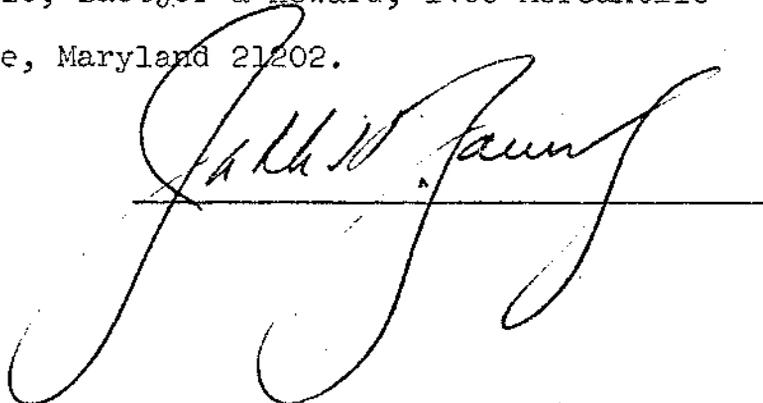


Joseph H. Young
900 First National Bank Bldg.
Baltimore, Maryland 21202
Le 9-2530



Paul V. Niemeyer
900 First National Bank Bldg.
Baltimore, Maryland 21202
Le 9-2530

I HEREBY CERTIFY that a copy of the foregoing Memorandum was this 12th day of August, 1969, mailed to Francis B. Burch, Office of the Attorney General, One Charles Center, Baltimore, Maryland 21201; to Leonard Kerpelman, Esq., 900 Light Street, Baltimore, Maryland 21230; and to Thomas Perkins, Esquire., Venable, Baetjer & Howard, 1400 Mercantile Trust Building, Baltimore, Maryland 21202.



ELINOR H. KERPELMAN,	:	IN THE
Complainant,	:	CIRCUIT COURT NO. 2
v.	:	OF
BOARD OF PUBLIC WORKS	:	BALTIMORE CITY
OF MARYLAND, et al.,	:	
Defendants.	:	

MEMORANDUM IN SUPPORT OF DEMURRER

The Defendant Board of Public Works adopts Point II of the Memorandum filed in behalf of the Defendant Maryland Marine Properties, Inc., and the authorities therein cited, as its supporting Memorandum.

Francis B. Burch
Attorney General

Fred Oken
Assistant Attorney General

One Charles Center
Baltimore, Maryland 21201
(539-4833)
Attorneys for Defendant
Board of Public Works

I HEREBY CERTIFY that on this 6th day of August, 1969, a copy of the foregoing Memorandum was mailed, postage prepaid, to Leonard J. Kerpelman, Esq., Attorney for Complainant, 500 Equitable Building, Baltimore, Maryland 21202, to Thomas P. Perkins III, Esq., Attorney for Defendant Maryland Marine Properties, Inc., 1400 Mercantile Trust Building, Baltimore, Maryland 21202, and to Defendant James B. Caine, Inc., c/o James B. Caine, Resident Agent, 53rd Street and Ocean Highway, Ocean City, Maryland 21842.

Fred Oken
Assistant Attorney General

ELINOR H. KERPELMAN, : IN THE
Plaintiff : CIRCUIT COURT
vs. : NO. 2
HON. MARVIN MANDEL, : OF
Governor, et al, : BALTIMORE CITY
Defendants :
: Docket 78A
: Folio 142
: Case # 42686A

DEMURRER OF DEFENDANT
MARYLAND MARINE PROPERTIES, INC.

Defendant, Maryland Marine Properties, Inc., by its attorneys, Thomas P. Perkins III and Robert A. Shelton, demurs to the Bill of Complaint filed by Plaintiff, Elinor H. Kerpelman, herein and to each and every paragraph thereof and as grounds for said Demurrer states as follows:

1. Plaintiff has totally failed to allege sufficient facts to establish her standing to sue in this case.
2. Plaintiff has totally failed to allege any facts which would be sufficient to constitute a cause of action or entitle her to the relief as prayed in the Bill of Complaint.
3. Plaintiff is barred by laches.
4. Such other and further grounds as will be set forth at the hearing on this Demurrer.

WHEREFORE, Defendant, Maryland Marine Properties, Inc., prays that this Honorable Court sustain its Demurrer without leave to amend, that the Bill of Complaint be dismissed as

against Defendant, Maryland Marine Properties, Inc. and that Defendant be awarded its costs of this suit.

Thomas P. Perkins III

Robert A. Shelton

1400 Mercantile Trust Building
Baltimore, Maryland 21202
752-6780

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Demurrer, Memorandum of Law and Request for Hearing were mailed by me postage prepaid, on this 22nd day of July, 1969 to Leonard J. Kerpelman Esquire, 500 Equitable Building, Baltimore, Maryland 21202, Attorney for Plaintiff, Elinor H. Kerpelman; to Defendant, James B. Caine, Inc., c/o James B. Caine, Resident Agent, 53rd Street and Ocean Highway, Ocean City, Maryland; and to Jon F. Oster, First Assistant Attorney General, Office of Attorney General, 1200 One Charles Center, Baltimore, Maryland 21201.

Thomas P. Perkins III

ELINOR H. KERPELMAN, : IN THE
Plaintiff : CIRCUIT COURT
vs. : NO. 2
HON. MARVIN MANDEL, : OF
Governor, et al, : BALTIMORE CITY
Defendants :
: Docket 78A
: Folio 142
: Case # 42686A

----- : -----
REQUEST FOR HEARING

Defendant, Maryland Marine Properties, Inc., hereby
requests a hearing in open court on its Demurrer filed herein.

Thomas P. Perkins III

Robert A. Shelton

ELINOR H. KERPELMAN,	:	IN THE
Plaintiff	:	CIRCUIT COURT
vs.	:	NO. 2
HON. MARVIN MANDEL,	:	OF
Governor, et al,	:	BALTIMORE CITY
Defendants	:	Docket 78A; Folio 142; Case #42686A

MEMORANDUM OF LAW OF DEFENDANT MARYLAND MARINE
PROPERTIES, INC. IN SUPPORT OF DEMURRER

The Plaintiff in this case, Elinor H. Kerpelman, has filed a taxpayer's suit making totally unfounded charges of fraud against the Governor, the Comptroller, and the Treasurer of the State of Maryland, acting in their official capacity as the Board of Public Works of Maryland. The suit challenges two conveyances of the interest of the State in certain "wetlands"^{1/} In each instance, the conveyance was made by the Board to the owner of the riparian shoreline in full accordance with the authority vested in the Board to make such conveyances pursuant to Section 15 of Article 78A of the Annotated Code of Maryland (1965 Replacement Volume). Plaintiff contends, however, that the Board acted fraudulently in entering in to such agreements.

This Demurrer is filed on behalf of Defendant, Maryland Marine Properties, Inc. The Bill of Complaint also challenges separate transactions involving Defendant James B. Caine, Inc. Maryland Marine Properties, Inc. has absolutely no relationship of any kind with Defendant Caine nor does the Bill of Complaint allege that there is any such relationship. This Memorandum, therefore, will consider primarily the allegations concerning Maryland Marine Properties, Inc.

^{1/} The "wetlands" (occasionally referred to as submerged land or marsh land) at issue in this case are lands lying between the mean high water line of the shoreline property owned by Defendant Maryland Marine Properties, Inc. and the bulkhead line contiguous to the shoreline. The bulkhead line was established by the company in accordance with permits granted by the U.S. Corps of Engineers, Maryland Department of Water Resources and the Worcester County Shoreline Commission.

The Demurrer of Defendant, Maryland Marine Properties, Inc. is based upon three separate and distinct grounds, each of which constitutes grounds for the granting of the Demurrer. First, under the well established law of Maryland, Plaintiff has totally failed to allege sufficient facts to support her standing to sue in this case. Second, regardless of the question of standing, Plaintiff has failed to allege any facts which constitute a cause of action or which would entitle her to any relief in a court of equity. Third, Plaintiff is clearly barred by laches in failing to bring this suit until a year after the Board of Public Works, in public session, entered into the agreements which Plaintiff now so belatedly challenges.

I. Plaintiff lacks standing to sue.

Elinor H. Kerpelman, Plaintiff, in paragraph 1 of her Bill of Complaint, bases her standing to sue solely upon the allegation that she is a "taxpayer of the State of Maryland". This is her only interest in the case. She further alleges that this suit is brought on behalf of "all others similarly situated."

The limitations upon the right of a Maryland taxpayer to sue to set aside both legislative and administrative governmental actions have been very clearly enunciated in numerous decisions of the Court of Appeals. In the very first case on the subject, the Court made it clear that an individual cannot seek injunctive relief, such as is demanded here, unless the Plaintiff has suffered some special damage. Taxpayers, in such suits, must allege an "increase of the burden of taxation upon their property". Baltimore vs. Gill, 31 Md. 375, 394 (1869).

This rule has since been applied in many other cases. See, e.g., McKaig vs. City of Cumberland, 208 Md. 95,102 (1954); Baltimore vs. Keyser, 72 Md. 106, 108 (1890).

The Court of Appeals recently had occasion to restate the applicable rule in the leading case of Murray, et al vs. Comptroller, 241 Md. 383, 391 (1965). The issue in the Murray case concerned the constitutionality of a statute creating tax exemptions. Judge Oppenheimer made it clear in his opinion that in order to challenge such a statute or an administrative action such as is questioned here, the Plaintiff must allege facts to establish an increase in his taxes resulting therefrom. As Judge Oppenheimer observed:

"If the taxpayers cannot show a pecuniary loss or that the statute results in increased taxes to them, they have no standing to challenge it." (241, Md. at 391)

In the Murray case, Judge Oppenheimer carefully reviewed the facts and found that the Plaintiff did have standing inasmuch as it was clear that if church-owned property were placed on the tax rolls, property taxes for individual property owners, such as the Plaintiff in the Murray case, would definitely be reduced.

Not only does the Plaintiff in this case totally fail to allege any such facts, but the only facts alleged are directly to the contrary. In paragraph 8, Plaintiff admits that the conveyances in question will actually increase the state tax base by putting additional property on the tax rolls. Such an admission is decisive on the question of standing.

Even though Plaintiff concedes that the transactions in question will actually increase state tax collections, Plaintiff makes an imaginative but futile attempt to establish standing

on other grounds. She contends that the increased tax collections will somehow be offset by the eventual destruction of the "wild natural resource cycle" of the State of Maryland. This will allegedly result from the filling in of the submerged land in question in this suit. In paragraph 3 of the Bill of Complaint, Plaintiff concedes that this case concerns only 190 acres of submerged land conveyed to Defendant Caine and 197 acres of submerged land conveyed to Defendant Maryland Marine Properties, Inc. With regard to the latter transaction, it is interesting to note that Plaintiff admits that Maryland Marine Properties, Inc. conveyed marsh lands to the State in exchange for marshlands which the Company acquired, thereby actually increasing rather than reducing the amount of such property in state ownership. Nevertheless, the critical point here, with regard to the Plaintiff's allegations, is that Plaintiff admits that only an insignificant amount of the wetlands in the State of Maryland is involved in this case. We are concerned here with a total of less than 400 acres of wetlands whereas in the State of Maryland there are 3,190 miles of tidal shoreline supporting such wetlands. 1967-68 Maryland Manual, Page 19. In the light of such facts, no one could seriously contend that the specific conveyances in question here could have any meaningful impact upon marine ecology or bring about the horrendous consequences which Plaintiff predicts for the distant future resulting from the filling in of a comparatively inconsequential acreage of marsh.

The facts as alleged only serve to point up Plaintiff's real concern in this case. Obviously, the two transactions in question are not of any real ecological significance

considering the huge inventory of marshlands and wetlands of the State of Maryland. What Plaintiff seeks to accomplish in this suit is to prevent the State from adopting a policy which would eventually result in the disposition after many years of a substantial part of the wetlands of the State of Maryland. This might in fact, at some future date, create significant "natural resource and wildlife losses" as asserted in paragraph 8 of the Bill of Complaint. Plaintiff seeks a political rather than a legal remedy. It is readily apparent that the Legislature and not this Honorable Court is the proper forum in which these broad questions of state policy should be debated and resolved. Several bills were in fact presented to the 1969 session of the General-Assembly dealing with the "wetlands issue". See, e.g., House Bills 468, 469 and 517 (1969 Session). The next session of the Legislature will most certainly again deal with the important considerations of balancing on the one hand the need to preserve a substantial inventory of wetlands in the State and on the other hand the need to provide adequate recreational facilities for an expanding population and a viable economy for rural counties such as Worcester County. The Legislature is and must be the forum in which these broad questions are resolved. They cannot be resolved by litigation seeking to set aside transactions made a year ago.

Plaintiff will most likely contend that she must bring this matter into court because, to date, governmental authorities have failed to take actions which she feels are adequate. As will be discussed in the next section of this Memorandum, however, the only question that a court of equity can consider in a case of this nature is the question of fraud. It cannot deal effectively with the broad issues of policy which are involved. Further, caught up in the emotion which

precipitated the filing of this suit, Plaintiff has totally overlooked the significant conservation efforts which have been and are being made in this area. The creation of the Assateague Island National Seashore, at great public expense, is but one example of such efforts.

In the instant case, as the allegations clearly show, the Board of Public Works had authority to enter into the transactions which are now questioned a year later. As a result of such transactions, the state property tax base will be increased rather than reduced. Therefore, Plaintiff clearly has failed to allege the facts necessary to give her the right to bring suit as a taxpayer and a demurrer should be sustained on this basis.

II. Plaintiff has failed to allege sufficient facts to constitute a cause of action.

In this case, Plaintiff seeks the extreme equitable remedy of a mandatory injunction to force the reconveyance of property which Plaintiff alleges was originally conveyed in accordance with agreements made with the Board of Public Works a year ago. Although this Honorable Court has the power to grant such relief (Maryland Rule BB 70a.), it is a well established principle of equity that this power will only be exercised with the greatest caution.

Plaintiff alleges that in 1968 the Board of Public Works entered into two agreements to transfer whatever interest it then held in 190 acres of submerged lands to Defendant Caine and 197 acres of submerged land to Defendant Maryland Marine Properties, Inc. There is simply no question in this case that the Board of Public Works had full statutory authority to enter

into such agreements in accordance with the provisions of Section 15 of Article 78A of the Annotated Code of Maryland (1965 Replacement Volume). Under such circumstances, it is perfectly clear that in order to challenge such transactions, Plaintiff must allege facts to establish fraud, corruption or such breach of trust as to be equivalent to fraud. It is not sufficient to challenge actions of public officials in a court of law or equity purely on the basis of a question of good judgment, which is the most that is alleged in this case. A court cannot sit as a reviewing body with regard to the discretionary acts of a state agency, particularly one as prestigious as the Board of Public Works, unless the Legislature establishes procedures in such regard which, of course, it has not done.

In Coddington v. Helbig, 195 Md. 330, 337 (1950), the Court of Appeals stated the law to be as follows:

"The law is firmly established that a court of equity, on the suit of a taxpayer, will restrain a municipal corporation or an administrative agency from entering into or performing an unlawful or ultra vires contract, when such action may injuriously affect the taxpayer's rights and property. But where the action of a municipal corporation or administrative agency is within the scope of its authority, and does not affect the vested rights of liberty or property, the court will not review its exercise of discretion, unless such exercise is fraudulent or corrupt or such abuse of discretion as to amount to a breach of trust." (emphasis supplied)

Similar statements are found in Hanna v. Board of Education, 200 Md. 49 (1950) and Terminal Construction Corp. v. Board of Public Works (Cir. Ct. of Baltimore City, Daily Record, July 29, 1957). In an excellent law review article on the subject, Judge Oppenheimer set forth the applicable standards as follows:

"Where the determination of the administrative tribunal is essentially legislative in character or where it does not directly affect vested rights of liberty or property, the Court will not review the exercise of discretion, unless it can clearly be shown that the power of the tribunal was corruptly or fraudulently used. The Court will intervene if there is no evidence to support the action of the administrative agency, and will require the agency to exercise its discretion if action is required by statute. But the Court will not interfere with or control the method of the exercise of discretion or the performance of any duty requiring the exercise of judgment, nor will it correct errors of discretion which have honestly been made in the discharge of such duty within the limits of the prescribed standard." Oppenheimer, Administrative Law in Maryland, 2 Md. L. Rev. 185, 209 (1938).

In paragraph 7 of the Bill of Complaint, Plaintiff makes purely conclusory allegations of "fraud" and "undue influence" presumably exercised in some mysterious and totally undescribed way upon the Governor, the Comptroller and the Treasurer of Maryland, both individually and collectively. In paragraph 6, Plaintiff recites that Maryland Marine Properties, Inc. conveyed to the State of Maryland marsh lands worth \$41,000 in exchange for the 197 acres of submerged land which the company acquired from the State.^{2/} These are the only facts alleged and indicate on their face that a substantial consideration was received by the State in connection with this exchange. Although for the purposes of this Demurrer, only those facts set forth in the Bill of Complaint can be considered by this Court, it is a matter of public record and public knowledge that Maryland Marine Properties, Inc. agreed to exchange and did, in fact, exchange more than two acres of marsh lands to the State of Maryland for every acre acquired by it. This exchange was made in full accordance with state policy as established at such time.

^{2/} In Florida and some other states, legislation has resulted from charges that developers sold submerged lots to unwary purchasers. Ironically, Plaintiff claims in this case that the developer has somehow cheated the State by buying submerged land for a substantial consideration.

Plaintiff further alleges not as a fact but as a totally unsupported speculation that the lands acquired by Maryland Marine Properties, Inc. were worth "200 times as much" as the consideration paid to the State. The Court simply cannot attach any weight to such a gratuitous and self-serving opinion.

Fraud is a most serious charge and becomes all the more so when made against public officials of the standing of the Governor, the Comptroller and the Treasurer of the State of Maryland. Such officials and the persons with whom they contract in good faith should not and cannot be required to answer to such charges without allegations of fact of the most convincing nature. They certainly cannot be held to answer to the totally unsubstantiated charges made in the Bill of Complaint in the instant case. Therefore, the Court should sustain Defendant's Demurrer inasmuch as the Plaintiff has totally failed to allege facts which would constitute a cause of action upon which any relief can be granted in a court of equity.

III. Plaintiff is barred by laches.

On June 25, 1969, Plaintiff filed this suit challenging transactions of the Board of Public Works which she states in her Bill of Complaint were completed in 1968. The Board of Public Works is a public body. Its statutory powers are exercised and performed in public session and are fully subject at such time to public scrutiny. Nevertheless, Plaintiff has seen fit to delay for a year the filing of a suit to challenge the agreements entered into by the Board of Public Works in 1968.

It is a well accepted maxim that equity "aids the vigilant and will not give relief to a person who has been dilatory in bringing his cause of action." James v. Zantzinger, 202 Md. 109, 116 (1953). In the recent case of Parker v. Board of Election Supervisors, 230 Md. 126 (1962), the Court of Appeals upheld the ruling of the trial court sustaining a demurrer and dismissing an action in an election case on the grounds of laches. The court observed that laches is a "defense in equity against stale claims, and is based upon grounds of sound public policy by discouraging fusty demands for the peace of society". (230 Md. at 130)

The above quotation is particularly applicable to the allegations set forth in the Bill of Complaint in this case. Plaintiff belatedly seeks to reopen matters which have long since been closed. Her motive in so doing is to challenge state policy. Her real concern is the future application of such policy rather than with its application to the transactions questioned in this case. If these transactions were to be challenged at all, they should have been challenged when they were originally agreed upon by the Board of Public Works in 1968 and not a year later. Plaintiff is now barred by laches and a Demurrer should be sustained on this basis.

Conclusion

It is clear from the face of the Bill of Complaint in this case that the Plaintiff lacks standing, has utterly failed to allege a meritorious claim and is guilty of laches.

Defendant, Maryland Marine Properties, Inc., respectfully submits that its Demurrer should be sustained on all three grounds.

Respectfully submitted,

Thomas P. Perkins III

Robert A. Shelton

EQUITY SUBPOENA

The State of Maryland

To

Louis L. Goldstein, Comptroller of the Treasury
Board Member of Public Works of Maryland

Serve on the Board Members at 2:00 PM June 16, 1969
Governor Office, Annapolis, Maryland

COPY

A. A. Co.
of Baltimore City, Greeting:

WE COMMAND AND ENJOIN YOU, That all excuses set aside, you do within the time limited by law, beginning on the first Monday of August, next cause an appearance to be entered for you, and your Answer to be filed to the Complaint of Kliner H. Kerpelman 2403 N. Rogers Ave.

against you exhibited in the CIRCUIT COURT No. 2 of BALTIMORE CITY.

HEREOF fail not, as you will answer the contrary at your peril:

WITNESS, the Honorable DULANY FOSTER, Chief Judge of the Supreme Bench of Baltimore City, the 12 day of May, 1969.
Issued the 10 day of July, in the year 1969.

G. Gordon Kirby
G. Gordon Kirby Clerk.

MEMORANDUM:

(General Equity Rule 11.)

You are required to file your Answer or defense in the Clerk's Office, Room No. 441, in the Courthouse, Baltimore City, within fifteen days after the return day, named in the above subpoena. Personal attendance in Court on the day named is not necessary, but unless you answer or make other defense within the time named, complainant(s) may obtain a decree pro confesso against you which upon proper proof may be converted into a final decree for the relief demanded.

CIRCUIT COURT No. 2

78-A 142

19 _____ Docket No. _____

Elinor H. Kerpelman

vs.

Hon. Marvin Mandel, etc., etal

SUBPOENA TO ANSWER BILL OF COMPLAINT

No. _____

Filed **10** day of **July**, 19**69**

Solicitor.

Address.

ELINOR H. KERPELMAN
2403 W. Rogers Avenue
Baltimore, Maryland 21209,
Complainant,

*Filed
June 25*

vs.

HON. MARVIN MANDEL, Governor,
LOUIS L. GOLDSTEIN, Comptroller of the Treasury, and
JOHN LEUTKEMEYER, Treasurer;
constituting the BOARD OF PUBLIC WORKS OF MARYLAND,
State Office Building,
301 W. Preston Street,
Baltimore 1, Maryland
(Serve one copy on the ~~Governor at above address~~
and one on Francis B. Burch, Esq.,
Attorney General of Maryland,
One Charles Center, Baltimore 2, Maryland),
JAMES B. GAINES, INC., a Maryland corporation,
(Serve on: James B. Gaines, Resident Agent,
53rd St. & Ocean Highway
Ocean City, Worcester Co., Maryland),
and
MARYLAND MARINE PROPERTIES, INC.,
a Maryland corporation,
(Serve on: Raymond D. Coates
Atlantic Hotel Building
Ocean City, Worcester Co., Maryland)
Defendants.

IN THE
CIRCUIT COURT

NO. 2

BALTIMORE CITY

Equity No.

" " " " "

BILL OF COMPLAINT FOR A MANDATORY
INJUNCTION, AND FOR DECLARATORY RELIEF

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Now comes Elinor H. Kerpelman, your Complainant, by Leonard J. Kerpelman,
her Solicitor, and says:

1. That she is a taxpayer of the State of Maryland, and a resident
thereof, in Baltimore City; this suit is brought on her own behalf, and on
behalf of all others similarly situated.

2. The Defendant Board of Public Works of Maryland, hereinafter sometimes
referred to as "Board of Public Works" or "Board", is charged by law, in
Article 78A, Section 15 of the Annotated Code of Maryland, with the authority
to dispose of lands of the State of Maryland by sale or otherwise providing
this is done for "a consideration adequate in the opinion of the Board of
Public Works..."; but also, by Article 6 of the Declaration of Rights of the

*Statute
gives
Board
broad
discretion*

Maryland Constitution, the Defendant Board Members, individually are "Trustees of the Public", in all that they do, and must reasonably exercise this fiduciary charge, particularly as to their stewardship of property.

3. In 1968, contrary to said Article 6 Trusteeship, and without the necessary opinion as to adequacy, the Defendant Board of Public Works, then composed in part of different membership, but being the same constitutional and statutory Board as the present Defendant Board, conveyed 190 acres of lands which were then the property of the people of the State of Maryland, unto the Defendant James B. Gaine, Inc.; and unto the Defendant Maryland Marine Properties, Inc., 197 acres of Maryland lands; or did so by mesne conveyances both for a totally inadequate and insufficient consideration, compared with the then fair market value or intrinsic value of the said lands, and the said Board then had no opinion upon the monetary adequacy of the consideration proffered; or had a mistaken, unreasonable, or totally false opinion of such adequacy, that said conveyances to the other Defendants respectively were therefore illegal, void, and a nullity as not complying with the necessary pre-condition set forth as to adequacy in said Art. 78A, Sec. 16; and as a violation of the Trusteeship imposed by Article 6 of the Declaration of Rights. The consideration for the said conveyances was also totally inadequate and insufficient considering the ecological consequences of the sale, and the direct consequent effect upon the natural resources of the State of Maryland, which are owned by the Complainant and all others similarly situated, and which are held in trust for her and the class which she represents in the within suit by the State of Maryland and its public officials including the Defendant Board.

4. The said lands referred to in paragraph 3 hereof, lay in Worcester County, and were marshlands and wetlands, which is to say, submerged and partially submerged lands, marshes, and shallows, peculiarly adapted to the production of certain important forms of marine life, and constituting an important link in the food chain of many economically valuable wild species of fish, animal and bird life, which abound in Maryland, and upon her waters, and which are owned in common, and used by all of the members of the class on whose behalf this suit is brought.

No facts alleged as to value

No allegation of lack of adequate Board hearing, or secret hearing, or state irregularity

Absence of such alleged indicators full fair, open hearing of Board

Cons to prior (Art III) B. Board suits

5. Said lands which were conveyed are intended to be, and are being, filled in and built up by those to whom they were conveyed, and their character as wetlands and marshlands is being completely obliterated, with the consequent destruction of support to said fish and animal species aforesaid referred to in paragraph 4.

6. The lands aforesaid which were sold to Maryland Marine Properties, Inc., were sold by an exchange for other marshlands and wetlands, which are cumulatively only one-half as productive of the important species of marine life and products as those which were conveyed to the said Maryland Marine Properties, Inc.; those sold to the defendant James B. Caine, Inc., were sold for a completely and totally inadequate money consideration, namely one hundred dollars per acre. Said lands which were sold to Maryland Marine Properties, Inc., were exchanged for wetlands and marshlands as aforesaid worth only \$41,000.00, while the lands conveyed to it were worth two hundred times as much in fair market monetary value; the lands conveyed to James B. Caine, Inc. were worth approximately five hundred times as much in fair market monetary value as the monetary consideration received by the Defendant Board of Public Works.

7. Said monetary consideration paid to Maryland was, in each case, *as was known to all parties at that time* completely and totally inadequate as to amount to a conveyance of the land by the Defendant Board of Public Works fraudulently, or by mistake, or by undue influence exerted upon it.

8. The Complainant and all others similarly situated, will be irreparably injured and damaged and have been so, by the said conveyances to the defendants, Maryland Marine Properties, Inc., and James B. Caine, Inc., in that valuable property, which is ecologically irreplaceable, owned by them or held in trust for them by the Defendant Board of Public Works, has been disposed of, and closed off to the wild natural resource cycle which it was a most essential, irreplaceable part of, and the Complainant and all others similarly situated are deprived of their use and benefit, which they otherwise would have, in return for a totally inadequate consideration and in return for a totally inadequate contribution by new owners of the said lands into the state treasury by way of real estate taxes paid and to be paid, the

value of which taxes will never compensate for the deprivation of said lands and the irreparable damage and injury which will be caused to the natural products and natural resources of the state of Maryland by the ecological disruption caused by the filling and loss of said wetlands, marshlands and shallows; which disruption may reasonably be expected to cause or substantially contribute to, natural resource and wildlife losses of many millions of dollars measured in financial terms alone.

9. The Defendant corporations and proceeding with great speed to fill in and eradicate as marshland and wetland, the lands in question.

10. The Complainant has no adequate remedy at law.

WHEREFORE, the Complainant prays:

(a) That this case be advanced on the Court Docket for immediate trial, and hearing on any motions which may be filed.

(b) That a Mandatory Injunction may issue, requiring the Defendants, Maryland Marine Properties, Inc., and James B. Caine, Inc., to reconvey to the State of Maryland, those lands in Worcester County, which are the subject of the within suit.

(c) That the Court declare the Deeds of Conveyance or mesne Deeds of Conveyance made by the Board of Public Works of Maryland of lands in Worcester County, Maryland, unto Maryland Marine Properties, Inc., and James B. Caine, Inc., which conveyances were made in 1968, of 197 acres and 190 acres, respectively, more or less, to be null, void, and of no effect, and that title remains in the People of Maryland.

(d) That the Complainant may have such other and further relief as the nature of her case may require.

AND, AS IN DUTY BOUND ET CETERA.

LEONARD J. KERPELMAN,
Attorney for Complainant
500 Equitable Building
Baltimore 2, Maryland
SA 7-8700

ELINOR H. KERPELMAN

EQUITY SUBPOENA

The State of Maryland

To

**John Leutkeneyer, Treasurer
Board Members of Public Works of Maryland**

**Serve on the Board Members at 2:00 June 16, 1969
Governor Office, Annapolis, Maryland**

COPY

**A. A. Co.
of Baltimore City, Greeting:**

WE COMMAND AND ENJOIN YOU, That all excuses set aside, you do within the time limited by law, beginning on the first Monday of **August**, next cause an appearance to be entered for you, and your Answer to be filed to the Complaint of **Elinor H. Kerpelmann 2403 W. Rogers Ave.**

against you exhibited in the CIRCUIT COURT No. 2 of BALTIMORE CITY.

HEREOF fail not, as you will answer the contrary at your peril:

WITNESS, the Honorable DULANY FOSTER, Chief Judge of the Supreme Bench of Baltimore City, the **12** day of **May**, 19 **69**.
Issued the **10** day of **July**, in the year 19 **69**.

G. Gordon Kirby
G. Gordon Kirby Clerk.

MEMORANDUM:

(General Equity Rule 11.)

You are required to file your Answer or defense in the Clerk's Office, Room No. 441, in the Courthouse, Baltimore City, within fifteen days after the return day, named in the above subpoena. Personal attendance in Court on the day named is not necessary, but unless you answer or make other defense within the time named, complainant(s) may obtain a decree pro confesso against you which upon proper proof may be converted into a final decree for the relief demanded.

CIRCUIT COURT No. 2

78-A 142

19 _____ Docket No. _____

Elinor H. Kerpelman

vs.

Hon. Marvin Mandel, etc., etal

SUBPOENA TO ANSWER BILL OF COMPLAINT

No. _____

Filed **10** day of **July**, 19 **69**

Solicitor.

Address.

ELINOR H. KERPELMAN
2403 W. Rogers Avenue
Baltimore, Maryland 21209,
Complainant,

Filed
June 25

vs.

HON. MARVIN MANDEL, Governor,
LOUIS L. GOLDSTEIN, Comptroller of the Treasury, and
JOHN LEUTKEMEYER, Treasurer;
constituting the BOARD OF PUBLIC WORKS OF MARYLAND,
State Office Building,
301 W. Preston Street,
Baltimore 1, Maryland
(Serve one copy on the ~~Governor at above address,~~
and one on Francis B. Burch, Esq.,
Attorney General of Maryland,
One Charles Center, Baltimore 2, Maryland),
JAMES B. CAINE, INC., a Maryland corporation,
(Serve on: James B. Caine, Resident Agent,
53rd St. & Ocean Highway
Ocean City, Worcester Co., Maryland),
and
MARYLAND MARINE PROPERTIES, INC.,
a Maryland corporation,
(Serve on: Raymond D. Coates
Atlantic Hotel Building
Ocean City, Worcester Co., Maryland)
Defendants.

Board Members at 2 PM June 76
Governor's Office NO. 2
Annapolis

IN THE
CIRCUIT COURT
BALTIMORE CITY
Equity No.

BILL OF COMPLAINT FOR A MANDATORY
INJUNCTION, AND FOR DECLARATORY RELIEF

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Now comes Elinor H. Kerpelman, your Complainant, by Leonard J. Kerpelman,
her Solicitor, and says:

1. That she is a taxpayer of the State of Maryland, and a resident thereof, in Baltimore City; this suit is brought on her own behalf, and on behalf of all others similarly situated.
2. The Defendant Board of Public Works of Maryland, hereinafter sometimes referred to as "Board of Public Works" or "Board", is charged by law, in Article 78A, Section 15 of the Annotated Code of Maryland, with the authority to dispose of lands of the State of Maryland by sale or otherwise providing this is done for "a consideration adequate in the opinion of the Board of Public Works..."; but also, by Article 6 of the Declaration of Rights of the

Maryland Constitution, the Defendant Board Members, individually are "Trustees of the Public", in all that they do, and must reasonably exercise this fiduciary charge, particularly as to their stewardship of property.

3. In 1968, contrary to said Article 6 Trusteeship, and without the necessary opinion as to adequacy, the Defendant Board of Public Works, then composed in part of different membership, but being the same constitutional and statutory Board as the present Defendant Board, conveyed 190 acres of lands which were then the property of the people of the State of Maryland, unto the Defendant James B. Gaine, Inc.; and unto the Defendant Maryland Marine Properties, Inc., 197 acres of Maryland lands; or did so by mesne conveyances both for a totally inadequate and insufficient consideration, compared with the then fair market value or intrinsic value of the said lands, and the said Board then had no opinion upon the monetary adequacy of the consideration proffered, or had a mistaken, unreasonable, or totally false opinion of such adequacy, that said conveyances to the other Defendants respectively were therefore illegal, void, and a nullity as not complying with the necessary precondition set forth as to adequacy in said Art. 78A, Sec. 16; and as a violation of the Trusteeship imposed by Article 6 of the Declaration of Rights. The consideration for the said conveyances was also totally inadequate and insufficient considering the ecological consequences of the sale, and the direct consequent effect upon the natural resources of the State of Maryland, which are owned by the Complainant and all others similarly situated, and which are held in trust for her and the class which she represents in the within suit by the State of Maryland and its public officials including the Defendant Board.

4. The said lands referred to in paragraph 3 hereof, lay in Worcester County, and were marshlands and wetlands, which is to say, submerged and partially submerged lands, marshes, and shallows, peculiarly adapted to the production of certain important forms of marine life, and constituting an important link in the food chain of many economically valuable wild species of fish, animal and bird life, which abound in Maryland, and upon her waters, and which are owned in common, and used by all of the members of the class on whose behalf this suit is brought.

5. Said lands which were conveyed are intended to be, and are being, filled in and built up by those to whom they were conveyed, and their character as wetlands and marshlands is being completely obliterated, with the consequent destruction of support to said fish and animal species aforesaid referred to in paragraph 4.

6. The lands aforesaid which were sold to Maryland Marine Properties, Inc., were sold by an exchange for other marshlands and wetlands, which are cumulatively only one-half as productive of the important species of marine life and products as those which were conveyed to the said Maryland Marine Properties, Inc.; those sold to the defendant James B. Caine, Inc., were sold for a completely and totally inadequate money consideration, namely one hundred dollars per acre. Said lands which were sold to Maryland Marine Properties, Inc., were exchanged for wetlands and marshlands as aforesaid worth only \$1,000.00, while the lands conveyed to it were worth two hundred times as much in fair market monetary value; the lands conveyed to James B. Caine, Inc. were worth approximately five hundred times as much in fair market monetary value as the monetary consideration received by the Defendant Board of Public Works.

7. Said monetary consideration paid to Maryland was, in each case, so *as was known to all parties at that time* completely and totally inadequate as to amount to a conveyance of the land by the Defendant Board of Public Works fraudulently, or by mistake, or by undue influence exerted upon it.

8. The Complainant and all others similarly situated, will be irreparably injured and damaged and have been so, by the said conveyances to the defendants, Maryland Marine Properties, Inc., and James B. Caine, Inc., in that valuable property, which is ecologically irreplaceable, owned by them or held in trust for them by the Defendant Board of Public Works, has been disposed of, and closed off to the wild natural resource cycle which it was a most essential, irreplaceable part of, and the Complainant and all others similarly situated are deprived of their use and benefit, which they otherwise would have, in return for a totally inadequate consideration and in return for a totally inadequate contribution by new owners of the said lands into the state treasury by way of real estate taxes paid and to be paid, the

value of which taxes will never compensate for the deprivation of said lands and the irreparable damage and injury which will be caused to the natural products and natural resources of the state of Maryland by the ecological disruption caused by the filling and loss of said wetlands, marshlands and shallows; which disruption may reasonably be expected to cause or substantially contribute to, natural resource and wildlife losses of many millions of dollars measured in financial terms alone.

9. The Defendant corporations and proceeding with great speed to fill in and eradicate as marshland and wetland, the lands in question.

10. The Complainant has no adequate remedy at law.

WHEREFORE, the Complainant prays:

(a) That this case be advanced on the Court Docket for immediate trial, and hearing on any motions which may be filed.

(b) That a Mandatory Injunction may issue, requiring the Defendants, Maryland Marine Properties, Inc., and James B. Caine, Inc., to reconvey to the State of Maryland, those lands in Worcester County, which are the subject of the within suit.

(c) That the Court declare the Deeds of Conveyance or name Deeds of Conveyance made by the Board of Public Works of Maryland of lands in Worcester County, Maryland, unto Maryland Marine Properties, Inc., and James B. Caine, Inc., which conveyances were made in 1968, of 197 acres and 190 acres, respectively, more or less, to be null, void, and of no effect, and that title remains in the People of Maryland.

(d) That the Complainant may have such other and further relief as the nature of her case may require.

AND, AS IN DUTY BOUND ET CETERA.

LEONARD J. KERPELMAN,
Attorney for Complainant
500 Equitable Building
Baltimore 2, Maryland
BA 7-8700

ELINOR H. KERPELMAN

Summary schedule 2/19/70 postfound.

Advised Hopton of Cabell's Trial 10/14/70
9/23/70 Notified Cabell's Aug. 7 Trial on 10/14/70
10/10/70 Rec'd order of dismissal from Cabell

Closed
10/2/73

15

ELINOR H. KERPELMAN,	:	IN THE
Complainant	:	CIRCUIT COURT NO. 2
v.	:	OF
FRANCIS B. BURCH,	:	BALTIMORE CITY
Attorney General of Maryland,	:	
Defendant	:	78-A-228/42831A
	:	
: : : : : : :		

ORDER OF COURT

The Court, having heard argument of counsel on Defendant's Motion for Summary Judgment as to the First Count of the Bill of Complaint filed herein, having duly considered the matter, and having rendered verbal opinion wherein the Motion was granted, it is this *6th* day of October, 1970, by the Circuit Court No. 2 of Baltimore City

ORDERED, that the First Count of the Bill of Complaint filed herein be and the same is hereby dismissed and that the relief prayed as regards the First Count of the Bill of Complaint filed herein be and the same is hereby denied, and it is further ordered that the costs of Court are to be assessed against the Complainant.

KS

JUDGE

Mr. Sweeney

James Hill
8/14

ELINOR H. KERPELMAN

Complainant

vs.

FRANCIS B. BURCH

Defendant

IN THE

CIRCUIT COURT NO. 2

OF BALTIMORE CITY

78A/228/42831A

ANSWER TO MOTION FOR
SUMMARY JUDGEMENT

Now comes the plaintiff, and says that there is a genuine dispute as to material facts:

1. Whether in fact, taking the position that submerged title lands of Maryland are alienable by the state, is a position which represents a proper interest of the state of Maryland.

2. Whether the consideration paid for the submerged lands in question was so inadequate as to raise an inference, or a rebuttable presumption, that the Board of Public Works could not have had an opinion that it was "adequate".

Leonard J. Kerpelman
Attorney for Complainant

Copies mailed Dec. 14

~~I~~ hereby: Robert F. Sweeney Deputy Attorney General
1201 Charles Center

William W. Chaill Jr. Esquire
10 Light Street 20th. Floor
Baltimore, Maryland 21202

Leonard J. Kerpelman
Attorney for Complainant

MEMORANDUM
OF
POINTS AND AUTHORITIES

1. Maryland Constitution, section on Duties of Attorney General.
2. Statute in Maryland Code on Duties of Attorney General.

STATE TWM DEPT

DEC 14 1964

RECEIVED

Mr. Sweeney

ELINOR H. KERPELMAN,
Plaintiff
v.
FRANCIS B. BURCH,
Defendant

IN THE
CIRCUIT COURT
NO. 2 OF
BALTIMORE CITY
78A/228/42831A

• • • • •
MOTION FOR
HEARING IN
OPEN COURT

TO THE HONORABLE, THE JUDGE OF SAID COURT:

The above case being at issue upon Bill and Answer, the Plaintiff under the 560th Rule of this Honorable Court, prays leave to be heard upon the matter in open court.

Leonard J. Kerpelman
Attorney for Plaintiff

I HEREBY CERTIFY that a copy of the foregoing was mailed this 4th day of November, 1969, to Robert F. Sweeney, Esq., 1201 One Charles Center, Baltimore 2, Maryland.

Leonard J. Kerpelman

RECEIVED

RECEIVED

ELINOR H. KERPELMAN	:	IN THE
Complainant	:	CIRCUIT COURT
vs.	:	OF
FRANCIS B. BURCH, Attorney General of Maryland	:	BALTIMORE CITY
Defendant	:	78A/228 42831A
	:	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Defendant moves for summary judgment on the ground that there is no genuine dispute between the parties as to any material fact, and that the Defendant is entitled to judgment as a matter of law.

Robert F. Sweeney
Deputy Attorney General
1200 One Charles Center
Baltimore, Maryland 21201
539-4833
Attorney for Defendant in his
capacity as Attorney General
of Maryland

William W. Cahill, Jr.
10 Light Street
Baltimore, Maryland 21202
539-2125
Attorney for Defendant in his
individual capacity

I HEREBY CERTIFY that on this day of ,
1969, a copy of the foregoing Motion was hand delivered to
Leonard J. Kerpelman, Esquire, 500 Equitable Building, Baltimore,
Maryland, 21202, Attorney for Complainant.

Robert F. Sweeney
Deputy Attorney General

ELINOR H. KERPELMAN	:	IN THE
Complainant	:	CIRCUIT COURT
vs.	:	OF
FRANCIS B. BURCH,	:	BALTIMORE CITY
Attorney General of Maryland	:	78A/228
Defendant	:	42831A
	:	

::: ::: :::

ANSWER OF DEFENDANT
TO COMPLAINANT'S INTERROGATORIES

The Defendant, Francis B. Burch, in answer to the Interrogatories propounded to him by the Complainant, Elinor H. Kerpelman, states as follows:

QUESTION: What lands do you own, or have any interest in, in Worcester county; and what lands do you elsewhere own, or have an interest in, in Maryland, which are near or contiguous to bodies or streams of navigable water; and answer likewise as to members of your immediate family?

ANSWER: I have an interest, along with nine other partners, in two parcels of land in Worcester County, Maryland. They are contiguous ocean-front lots in the northern part of Ocean City, Maryland. The first parcel, with 200 feet of ocean front, was acquired by the partnership by deed dated March 15, 1969, recorded among the Land Records of Worcester County on April 3, 1969. The second parcel, with 245 feet of ocean front, is under option to the partnership dated January 9, 1969. I own, or have an interest in, no other land in Worcester County, Maryland. Neither of the members of my immediate family nor I own, or have an interest in, any other land in Maryland which is near or

ELINOR H. KERPELMAN	:	IN THE
Complainant	:	CIRCUIT COURT
vs.	:	OF
FRANCIS B. BURCH,	:	BALTIMORE CITY
Attorney General of Maryland	:	78A/228
Defendant	:	42831A
	:	
:::	:::	:::

ANSWER OF DEFENDANT
TO COMPLAINANT'S INTERROGATORIES

The Defendant, Francis B. Burch, in answer to the Interrogatories propounded to him by the Complainant, Elinor H. Kerpelman, states as follows:

QUESTION: What lands do you own, or have any interest in, in Worcester county; and what lands do you elsewhere own, or have an interest in, in Maryland, which are near or contiguous to bodies or streams of navigable water; and answer likewise as to members of your immediate family?

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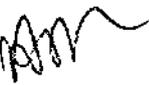
STATE LAW DEPARTMENT

ONE SOUTH CALVERT BUILDING
CALVERT AND BALTIMORE STREETS
BALTIMORE, MARYLAND 21202

DATED 6-28-74

MEMORANDUM:

TO: General Burch

FROM: Henry R. Lord 

SUBJECT:

CONFIDENTIAL

Before you left for Idaho I reminded you that your property holdings in Ocean City, which were the subject of a recent Washington Post story, had also been submitted to the Circuit Court for Baltimore City and to the Ethics Committee of the Maryland State Bar Association for review several years ago.

Attached hereto is a copy of the Answer and of the Answer to Interrogatories filed in your behalf in that case, a letter to you from the Governor, dated November 5, 1969, the answer, as well as an excerpt from Judge Perrott's November 6, 1969, ruling in your favor. The letter from the Governor was written in response to your letter to him, dated October 21, 1969, a copy of which is attached to the answer. You will recall that I worked on this matter for you and have full recollection of it. I thought that you would want to keep these papers handy in the event that anyone else raises this red herring issue.

HRL
k

Attachments

FBB
phone

M E M O

To: FBB

Date: 6/21/74

From: Harry Lord

I looked at our office file in Kerpleman vs. Burch and for some reason it is incomplete. It does reflect that an opinion was requested from the Ethics Committee from the Md. State Bar Association and from Governor Mandel under the Code of Ethics but does not contain the responses. I called Bill Cahill who was representing you in your private capacity but he is out of town today. I hope to have a file in hand on Monday, however. If you want, I can check the court file on Monday as some of this material may be there.

Sarah and I are enroute to the Tides Inn in Virginia to celebrate our 5th Wedding Anniv.

HRL

Harry -
Anything more on this?

ELINOR H. KERPELMAN	:	IN THE
Complainant	:	CIRCUIT COURT
vs.	:	OF
FRANCIS B. BURCH,	:	BALTIMORE CITY
Attorney General of Maryland	:	78A/228
Defendant	:	42831A .

::: ::: ::: :::

ANSWER

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Now comes Defendant, Francis B. Burch, in his capacity as Attorney General of Maryland, by his attorney, Robert F. Sweeney, Deputy Attorney General, and in his individual capacity, by his attorney, William W. Cahill, Jr., and, in answer to the Bill of Complaint for an Injunction, and each and every paragraph thereof says:

1. That in answer to Paragraph 1 of said Bill of Complaint, he admits that litigation, captioned "Kerpelman v. Mandel, et al." Circuit Court No. 2 of Baltimore City, Docket 78A, Folio 142, File No. 42686-A", was filed by the Complainant herein; that on August 7, 1969, he filed a Demurrer and Memorandum in support thereof on behalf of the Defendant Board of Public Works of Maryland in that litigation; and that on September 29, 1969, the litigation was dismissed by Order of Court, upon payment of costs by the Complainant, after the Demurrers and Motions Raising Preliminary Objections of various defendants had been sustained with leave granted to the Complainant herein to amend her Bill of Complaint within 20 days. He avers that Complainant's characterization of the legal and factual allegations raised in that litigation, contained in Paragraph 1 of the present Bill

of Complaint, should be disregarded by this Honorable Court, the Bill of Complaint in that terminated litigation being the best evidence of its contents. He denies the remaining allegations of Paragraph 1 of the Bill of Complaint.

2. That he denies the allegations contained in Paragraph 2 of the Bill of Complaint, except that he admits that his appearance was entered as counsel for the Defendant Board of Public Works of Maryland in the terminated litigation entitled "Kerpelman v. Mandel, et al., Circuit Court No. 2 of Baltimore City, Docket 78A, Folio 142, File No. 42686-A" and has also been entered as counsel for Defendant Board of Public Works of Maryland in the pending litigation, captioned "Kerpelman v. Mandel, et al., Circuit Court for Worcester County, Chancery No. 8934", filed on September 30, 1969; and that he filed a Demurrer, sustained by the Circuit Court No. 2 of Baltimore City, to the Bill of Complaint in the terminated litigation.

3. Because no additional allegations are contained in Paragraph 3 of the Bill of Complaint, no answer is required to that paragraph.

4. That he denies the allegations contained in Paragraph 4 of the Bill of Complaint, except that he admits that he is constitutionally required, by Article V, Section 3 of the Maryland Constitution, to provide legal representation to the Board of Public Works of Maryland in actions brought against it.

5. Because no additional allegations are contained in Paragraph 5 of the Bill of Complaint, no answer is required to that paragraph.

6. That he denies the allegations contained in Paragraph 6,

except that he admits that Chapter 402 of the Laws of Maryland of 1969 amended Article 19A of the Maryland Code, title "Conflict of Interest", and that he admits the partial ownership of two parcels of real estate located in Ocean City, Maryland, upon which it is anticipated that an inn will be built, which interest is more specifically described in Paragraph 7, infra.

And further answering, says:

7. That he, in and through a partnership with nine others known as "Ocean City Joint Venture & Partnership", purchased 200 feet of ocean-front property in the northern part of Ocean City, Maryland, by deed dated March 15, 1969, and recorded on April 3, 1969. This same entity purchased on January 9, 1969, an option on an adjoining parcel of land consisting of an additional 245 feet of ocean-front property. He is one of four trustees, all of whom are partners, authorized by the Joint Venture and Partnership Agreement to act on behalf of all the partners in the venture. The entity has purchased a franchise from Holiday Inns of America, has solicited bids from several construction companies, and anticipates in the near future the commencement of construction at this site of a Holiday Inn facility opening on or about April 15, 1971. His capital share in this undertaking is approximately 10.5%. He owns no other real estate in Maryland, either directly or indirectly, which fronts upon either ocean, rivers, bays, streams, or other navigable bodies of water.

8. That the decisions of the Board of Public Works of Maryland being tested by the Complainant in "Kerpelman v. Mandel, et al.", Circuit Court for Worcester County, Chancery No. 8934" are those authorizing transfer by the State of Maryland of 190 acres of "wetlands" property to James B. Caine, Inc., a Maryland

corporation, and 197 acres of "wetlands" property to Maryland Marine Properties, Inc., a Maryland corporation, both of which transfers of land involved land in and abutting tidal bays in Worcester County, Maryland.

9. That Complainant is challenging, first, the authority of the Board of Public Works of Maryland to dispose of these two tracts of "wetlands" property alleging that "wetlands" property cannot be conveyed from public to private ownership, and, second, the good faith of the Board of Public Works of Maryland in making these transfers because of the inadequacy of the consideration paid for them.

10. That with respect to Complainant's first allegation outlined in Paragraph 9 of this Answer, supra (directly contrary to the scurrilous innuendos and malicious suggestions of impropriety contained in Paragraphs 2, 4 and 6 of the Bill of Complaint filed in the within proceeding), the Defendant denies that he "has a direct financial interest in having the question of ownership of submerged lands in front of shore lands on navigable waters ... resolved against the people and the State of Maryland"; to the contrary, the Defendant states that he has no personal interest whatsoever in the outcome of said litigation; and the Defendant further denies that he "has a direct financial interest in placating and favoring county zoning and public officials of Worcester County", stating that at the time of the purchase of the 200 feet of ocean-front property and the acquisition of the option for the additional 245 feet of ocean-front property by the partnership, of which the Defendant is a member, all of said ocean-front property was then and is now zoned for the use intended and in addition, at the time of said acquisitions, public water and sewer existed along the entire western property line of said property; and the Defendant further states that all that need be done by any public officials in Worcester County

with respect to the development of said ocean-front property is the ministerial duty of issuing a building permit upon application and payment of the fees therefor by the partnership and the granting of a height variance by the Board of Zoning Appeals of Ocean City in accordance with that Board's consistently applied and unvaried practice of granting such variances upon application.

11. That with respect to Complainant's second allegation outlined in Paragraph 9, supra, no possibility of conflict of interest, either direct or indirect, exists.

12. That, in order that there can be no shadow of doubt as to the propriety of Defendant's conduct in representing the Board of Public Works of Maryland in "Kerpelman v. Mandel, et al. Circuit Court for Worcester County, Chancery No. 8934" and despite Defendant's firm belief that no real or imagined conflict exists, he has followed the express procedure set out in Article 19A, Sections 1-3 of the Maryland Code and has written the Governor of Maryland regarding this matter, pursuant to Section 3 of that Article, a copy of which letter is attached hereto as Exhibit A.

WHEREFORE, Defendant prays that the Bill of Complaint for an Injunction be dismissed with prejudice and that all costs therefor be assessed against the Complainant.

Robert F. Sweeney
Deputy Attorney General
1200 One Charles Center
Baltimore, Md. 21201
539-4833
Attorney for Defendant in his capacity
as Attorney General of Maryland

William W. Cahill, Jr.
10 Light Street
Baltimore, Md. 21202
539-2125
Attorney for Defendant in his
individual capacity

STATE OF MARYLAND
to wit:
CITY OF BALTIMORE

I HEREBY CERTIFY that on this day of October, 1969,
before me, the subscriber, a Notary Public of the State of Mary-
land in and for Baltimore City, personally appeared Francis B.
Burch, Defendant in the subject litigation, and made oath in
due form of law that the matters and facts contained in each and
every paragraph are true and accurate to the best of his
knowledge, information and belief.

WITNESS my hand and Notarial Seal.

Francis B. Burch

Notary Public

I HEREBY CERTIFY that on this day of October, 1969,
a copy of the foregoing Answer was mailed, postpaid, to Leonard
J. Kerpelman, Esquire, 500 Equitable Building, Baltimore, Mary-
land, 21202, Attorney for Complainant.

Robert F. Sweeney
Deputy Attorney General

ELINOR H. KERPELMAN	:	IN THE
Complainant	:	CIRCUIT COURT
vs.	:	OF
FRANCIS B. BURCH,	:	BALTIMORE CITY
Attorney General of Maryland	:	78A/228
Defendant	:	42831A
	:	
	:::	:::

ANSWER OF DEFENDANT
TO COMPLAINANT'S INTERROGATORIES

The Defendant, Francis B. Burch, in answer to the Interrogatories propounded to him by the Complainant, Elinor H. Kerpelman, states as follows:

QUESTION: What lands do you own, or have any interest in, in Worcester county; and what lands do you elsewhere own, or have an interest in, in Maryland, which are near or contiguous to bodies or streams of navigable water; and answer likewise as to members of your immediate family?

ANSWER: I have an interest, along with nine other partners, in two parcels of land in Worcester County, Maryland. They are contiguous ocean-front lots in the northern part of Ocean City, Maryland. The first parcel, with 200 feet of ocean front, was acquired by the partnership by deed dated March 15, 1969, recorded among the Land Records of Worcester County on April 3, 1969. The second parcel, with 245 feet of ocean front, is under option to the partnership dated January 9, 1969. I own, or have an interest in, no other land in Worcester County, Maryland. Neither the members of my immediate family nor I own, or have an interest in, any other land in Maryland which is near or

contiguous to bodies or streams of navigable water.

Francis B. Burch

STATE OF MARYLAND
CITY OF BALTIMORE to wit:

I HEREBY CERTIFY that on this _____ day of October, 1969, before me, the subscriber, a Notary Public of the State of Maryland in and for Baltimore City, personally appeared Francis B. Burch who made oath in due form of law that the matters and facts set out in the foregoing Answer are true to the best of his knowledge, information and belief.

WITNESS my hand and Notarial Seal.

Notary Public

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of October, 1969, a copy of the foregoing Answer was mailed, postpaid, to Leonard J. Kerpelman, Esquire, 500 Equitable Building, Baltimore, Md. 21202, Attorney for Complainant.

Robert F. Sweeney
Deputy Attorney General



MARVIN MANDEL
GOVERNOR

EXECUTIVE DEPARTMENT

ANNAPOLIS, MARYLAND 21404

November 5, 1969

Honorable Francis B. Burch
Attorney General of Maryland
1 Charles Center
Baltimore, Maryland 21202

Dear Attorney General Burch:

This is in reply to your letter of October 21, 1969, relating to Mr. Kerpelman's allegation of a conflict of interest in connection with your representing the Board of Public Works in certain pending litigation.

I reviewed the allegations, the pertinent facts, and the pleadings, and could discern no conflict of interest on your part. However, as I am one of the defendants in the action, I believed that the question of an alleged conflict should be reviewed by an impartial group. Consequently, I requested the President of the Maryland State Bar Association to refer the matter to the Association's Committee on Ethics in order that the Committee could give me an advisory opinion concerning the allegation.

On October 29, 1969, the Committee on Ethics held a meeting at which they heard from Mr. Kerpelman and yourself and reviewed the relevant documents. By letter dated October 30, 1969, the Committee informed the President of the Maryland State Bar Association that it found "no evidence of unethical conduct on the part of the Attorney General or his office." The President in turn has forwarded the Committee's report to me.

Based upon my review of the matter, together with the report by the Committee on Ethics of the Maryland State Bar Association, I have concluded that the allegation of a conflict is unfounded. Therefore, pursuant to the authority vested in me by Article V, section 3, of the Maryland Constitution, I request that you continue to represent the defendants in the subject litigation.

Sincerely,

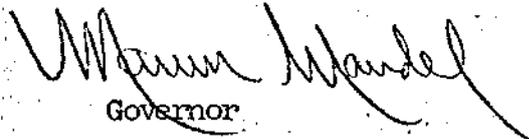

Governor

EXHIBIT A

OFFICES OF



THE ATTORNEY GENERAL
ONE CHARLES CENTER
BALTIMORE, MARYLAND 21201

FRANCIS D BURCH
ATTORNEY GENERAL

October 21, 1969

Honorable Marvin Mandel
Governor of Maryland,
State House
Annapolis, Maryland

Dear Governor Mandel:

Leonard J. Kerpelman, Esq. represents the complainant in a suit recently filed and now pending in the Circuit Court for Worcester County (Kerpelman v. Mandel, et al, Circuit Court for Worcester County, chancery #8934, filed September 30, 1969) which seeks a reconveyance of the wetlands transferred by the Board of Public Works of Maryland to James B. Caine, Inc. and Maryland Marine Properties, Inc. Because Article V, Sect. 3 of the Maryland Constitution requires that I represent agencies and departments of the State Government, the suit papers were forwarded to me and I have just entered my appearance on behalf of the Board of Public Works of Maryland. The Bill of Complaint questions the authority of the Board of Public Works of Maryland to transfer wetlands property from public ownership to private ownership and alleges fraud and bad faith on the part of the members of the Board of Public Works, because of the purportedly inadequate consideration supporting the transfer.

Mr. Kerpelman, by a separate suit now seeks to enjoin me from representing the Board of Public Works of Maryland in the Worcester County litigation because of an alleged conflict of interest involving a personal real estate investment. I personally feel that the position of Mr. Kerpelman is scurrilous, is entirely unjustified and is prompted by highly questionable motives. In order to satisfy the trial courts where the litigation is pending, as well as the citizens of Maryland that no impropriety or conflict whatsoever exists, I am requesting that you review the matter, pursuant to your authority contained in Article 19 A of the Maryland Code, and advise whether in your opinion any conflict does exist.

Honorable Marvin Mandel
October 21, 1969
Page two

Article 19 A, as amended by Chapter 402 of the Laws of Maryland of 1969, permits you as Governor (as, I understand no Board of Ethics has as yet been appointed), to determine whether an agency head is personally and substantially involved as a State official in a judicial or other proceeding in which he has a "financial interest" as defined by Section 2 of the Article.

Since you are one of the defendants in the suit which Mr. Kerpelman has sought to enjoin me from participating in, it might be that if you were to make a determination as to any possible conflict on my part, Mr. Kerpelman in turn would make an unfounded and malicious charge that you too were guilty of a conflict because you were acting in a matter in which you yourself would have a personal interest. Therefore, you might want to consider referring the matter to the Committee on Ethics of the Maryland State Bar Association for an advisory opinion which you could take into consideration in making your final determination under the provisions of Article 19 A.

Along with nine other partners I have an interest in 200 feet of ocean-front property in the northern part of Ocean City, Maryland, which property was conveyed to the partnership by deed dated March 16, 1969, recorded among the land records of Worcester County on April 3, 1969. We also purchased on January 9, 1969 an option on the adjacent parcel consisting of an additional 245 feet of ocean-front property. We have obtained a franchise from Holiday Inns of America and intend to build a Holiday Inn facility on this property. We have obtained bids from several construction companies and anticipate commencement of construction in the near future with a target date for opening of April 15, 1971. My capital share in this venture is approximately 10.5%. I own no other real estate, either directly or indirectly, which fronts upon oceans, rivers, bays or other navigable bodies of water in Maryland and specifically have no interest in real property fronting upon Sinepatuxent Bay or Assowoman Bay in Worcester County.

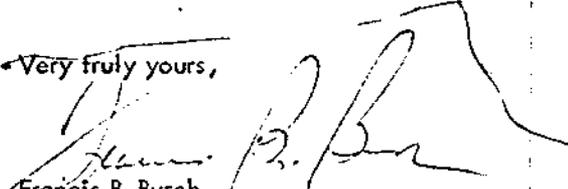
It is my firm belief that the ocean-front property in which I have an interest can in no way be affected by the outcome of Mr. Kerpelman's suit respecting transfers of wetlands by the Board of Public Works of Maryland in the tidal bays in Worcester County.

Under these circumstances I would very much appreciate your reviewing this situation and advising me as soon as possible whether you find any conflict between my personal investment and my representation of the Board of Public Works of Maryland in the litigation in question.

Honorable Marvin Mandel
October 21, 1969
Page three

I am enclosing for your consideration a copy of the Bill of
Complaint and Demurrer in the Worcester County suit and of the Bill of
Complaint and Answer in Mr. Kerpelman's suit against me.

Very truly yours,


Francis B. Burch
Attorney General

1 is no evidence before me that the Attorney General or any
2 member of his immediate family has any financial interest
3 whatsoever in the land involved in the wetlands case now
4 pending before the Circuit Court for Worcester County.

5 I have the benefit of very little, if any,
6 testimony, other than the statements of the attorneys in
7 this particular case -- Mr. Sweeney, the Deputy Attorney
8 General, on behalf of the State of Maryland; Mr. Cahill,
9 on behalf of Mr. Burch individually, and Mr. Kerpelman, on
10 behalf of Mrs. Kerpelman. To carry Mr. Kerpelman's theory
11 to its logical conclusion, it would be impossible for any
12 elected or appointed public official or any member of a
13 State Board or employee of any department of the State to
14 engage in private investing, and I do not believe that was
15 the intention of the Legislature, as I read Chapter 402 of
16 the Laws of Maryland 1969. I do not find, to be very frank
17 with you, gentlemen, one scintilla of evidence in the
18 matter that has been before me of any conflict of interest
19 or impropriety on the part of the Attorney General of the
20 State. I will, therefore, not grant the injunction.

21 Mr. Sweeney, if you and Mr. Cahill will pre-

1 pare the appropriate order, I will sign it.

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1 ELINOR H. KERPELMAN, : IN THE
2 Complainant : CIRCUIT COURT No. 2
3 Vs. : OF
4 FRANCIS B. BURCH, : BALTIMORE CITY
Attorney General of Maryland, :
5 Defendant : 78A/228/42831A
6 :

7 -----

8 November 6, 1969

9 Before:

10 HONORABLE JAMES A. PERROTT, JUDGE

12 -----

13 APPEARANCES:

14 LEONARD J. KERPELMAN, ESQ., on behalf
of the Complainant.

15 ROBERT F. SWEENEY, ESQ., on behalf of
16 the Defendant, Burch, as Attorney General.

17 WILLIAM W. CAHILL, JR., ESQ., on behalf
of the Defendant, Burch, individually.

19 -----

20 Reported By: Doris E. Gaffney,
Official Court Reporter

21

1 THE COURT: Gentlemen, the Court has
2 before it a Bill of Complaint for an injunction filed by
3 Mrs. Elinor H. Kerpelman, who is a taxpayer of the State
4 of Maryland, against Francis B. Burch, who is the Attorney
5 General of the State of Maryland. The essence of Mrs.
6 Kerpelman's Bill of Complaint is, basically, that the
7 Attorney General is guilty of a conflict of interest in the
8 now celebrated "wetlands cases" because he is an owner of
9 certain lands situate in Worcester County. The Bill states
10 that the Attorney General is one of ten partner-owners of
11 two ocean front lots, although admittedly not wetland lots,
12 within the northern limits of Ocean City, and that on the
13 two said lots the partners propose to build a hotel or inn
14 in the future. The Attorney General, in his Answer to the
15 Complainant's Interrogatories, admits that he does have an
16 interest, along with nine other partners, in two parcels of
17 ocean front land in Worcester County, Maryland. The first
18 parcel, with two hundred feet of ocean front, was acquired
19 by the partnership by deed dated March 15, 1969, and duly
20 recorded among the Land Records of Worcester County on April
21 3, 1969. The second parcel, consisting of two hundred forty-

1 five feet of ocean front land, is under option, dated
2 January 9, 1969, to the partnership. The Attorney General
3 further admits that he owns or has an interest in no other
4 land in Worcester County, Maryland. He further states that
5 neither the members of his immediate family nor he owns nor
6 has any interest in any other land in Maryland which is near
7 or contiguous to bodies or streams of navigable waters. In
8 his Answer, the Attorney General states that he is a partner
9 with nine others in a venture known as "Ocean City Joint
10 Venture and Partnership". He further states that he is one
11 of four trustees duly authorized by the Joint Venture and
12 Partnership Agreement to act on behalf of all partners in
13 the venture. This venture, according to the Answer of the
14 Attorney General, has purchased a franchise from Holiday
15 Inns of America, and, as is customary with that type of an
16 operation, bids were solicited from several construction
17 companies; the commencement of construction is contemplated
18 in the near future, and the opening will be some time
19 around April 15, 1971. An important item is that the
20 Attorney General states that his share in this undertaking
21 is 10.5%.

1 Pursuant to the newly enacted law commonly
2 called the Conflict of Interest Law, which is Chapter 402,
3 Laws of Maryland 1969, it provides for certain criminal
4 penalties for certain public officials or certain State
5 employees -- and I will read -- to participate personally
6 and substantially as a State officer, employee or agent
7 through decision, approval, disapproval, recommendation, the
8 rendering of advice, investigation or otherwise, in a judicial
9 or other proceeding, application, request for a ruling or
10 other determination, contract, claim, controversy, charge,
11 accusation, arrest or other particular matter in which, to
12 his knowledge, he, his spouse, parent, minor child, brother
13 or sister has a financial interest or to which any firm,
14 corporation, association or other organization in which he
15 has a financial interest or in which he is serving as officer,
16 director, trustee, partner, or employee, or any person or
17 organization with whom he is negotiating or has any arrange-
18 ment concerning prospective employment, is a party.

19 Then the Act proceeds to determine what is
20 meant by financial interest. As used in this Article, the
21 term "financial interest" shall mean ownership of any interest

1 or involvement in any relationship from or as a result of
2 which the owner has, within the past three years, received
3 or is presently or in the future entitled to receive more
4 than \$1,000.00 per year, or ownership of more than 3% of the
5 invested capital or capital stock of any firm, corporation,
6 association or other organization, or ownership of securities
7 or obligations of any type which are or may become equivalent
8 to or convertible into ownership of more than 3% of the
9 invested capital or capital stock of any firm, corporation,
10 association or organization.

11 Section 1 hereof shall not apply if the
12 officer, employee or agent first makes written disclosure
13 to a Board of Ethics, if any, appointed by the Governor
14 pursuant to Section 14A of Article 41 of the Annotated Code
15 of Maryland (1968 Supplement) and to the chairman or the
16 chief executive officer or administrative officer of his
17 State agency or, if said officer or employee is an agency
18 head, then to the Governor, of the financial interest and
19 the nature and circumstances of the agency transaction
20 involved and is either officially relieved from responsibility
21 in the particular matter or receives in advance a written

1 determination by the Board of Ethics, or if no Board of
2 Ethics exists then by said chief executive or administrative
3 officer of the agency or by the Governor, that under the
4 circumstances the public welfare and interest in the officer's,
5 employee's or agent's participation exceeds the public
6 interest in his disqualification or if by written order the
7 said Board of Ethics or under a specific provision the Code
8 of Ethics promulgated by the Governor pursuant to Section
9 14A of Article 41 of the said Code, as amended from time to
10 time, shall have exempted the particular State officer,
11 employee or agent or class of which he is a member or the
12 particular transaction in which he has participated from
13 the requirements of disclosure and nonparticipation in the
14 transaction.

15 Now, I can find no provision here in the law
16 which would restrict the Attorney General or any other
17 person, be he agent or employee of any Department, Board,
18 Commission, Authority or public agency, in this type of
19 joint venture. There is no evidence before this Court that
20 the land was purchased from the State of Maryland or from
21 any other group responsible to the State of Maryland. There

1 is no evidence before me that the Attorney General or any
2 member of his immediate family has any financial interest
3 whatsoever in the land involved in the wetlands case now
4 pending before the Circuit Court for Worcester County.

5 I have the benefit of very little, if any,
6 testimony, other than the statements of the attorneys in
7 this particular case -- Mr. Sweeney, the Deputy Attorney
8 General, on behalf of the State of Maryland; Mr. Cahill,
9 on behalf of Mr. Burch individually, and Mr. Kerpelman, on
10 behalf of Mrs. Kerpelman. To carry Mr. Kerpelman's theory
11 to its logical conclusion, it would be impossible for any
12 elected or appointed public official or any member of a
13 State Board or employee of any department of the State to
14 engage in private investing, and I do not believe that was
15 the intention of the Legislature, as I read Chapter 402 of
16 the Laws of Maryland 1969. I do not find, to be very frank
17 with you, gentlemen, one scintilla of evidence in the
18 matter that has been before me of any conflict of interest
19 or impropriety on the part of the Attorney General of the
20 State. I will, therefore, not grant the injunction.

21 Mr. Sweeney, if you and Mr. Cahill will pre-

1 pare the appropriate order, I will sign it.

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Miss K
Where are
the hints? — 733 Row
(J)

6-28-74

General Burch

Henry R. Lord

Before you left for Idaho I reminded you that your property holdings in Ocean City, which were the subject of a recent Washington Post story, had also been submitted to the Circuit Court for Baltimore City and to the Ethics Committee of the Maryland State Bar Association for review several years ago.

Attached hereto is a copy of the Answer and of the Answer to Interrogatories filed in your behalf in that case, a letter to you from the Governor, dated November 5, 1969, the answer, as well as an excerpt from Judge Perrott's November 6, 1969, ruling in your favor. The letter from the Governor was written in response to your letter to him, dated October 21, 1969, a copy of which is attached to the answer. You will recall that I worked on this matter for you and have full recollection of it. I thought that you would want to keep these papers handy in the event that anyone else raises this red herring issue.

HRL
k

Attachments

STATE LAW DEPARTMENT

**ONE SOUTH CALVERT BUILDING
CALVERT AND BALTIMORE STREETS
BALTIMORE, MARYLAND 21201**

DATED 9/13/71

MEMORANDUM:

TO: Frank X. Pugh
FROM: Henry R. Lord 
SUBJECT: Kerpelman vs. Burch

As you can see this case has been set for trial on October 5. It appears that the case was fully disposed of by Court Order of Judge Perrott on October 6. If so, please see that Kerpelman pays the Court costs and that the trial date is taken out and that the docket on this case is closed. Bill Cahill represented the Attorney General in his individual capacity, and you should also contact him.

HRL:aba

8874 A

IN THE
Court of Appeals of Maryland

SEPTEMBER TERM 1970

No. 364

ELINOR H. KERPELMAN,
Appellant,

vs.

MARVIN MANDEL, Governor, LOUIS L. GOLD-
STEIN, Comptroller of the Treasury, and JOHN
LUETKEMEYER, Treasurer; constituting the
BOARD OF PUBLIC WORKS OF MARYLAND,
JAMES B. CAINE, INC., a Maryland Corporation,
and MARYLAND MARINE PROPERTIES, INC., a
Maryland corporation,
Appellees.

Appeal from the Circuit Court of Worcester County
(PRETTYMAN, J.)

APPELLANT'S BRIEF AND APPENDIX

LEONARD J. KERPELMAN

Attorney for Appellant.

2403 Rogers Building
Baltimore, Maryland 21209
SA 7-8700

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2. Are submerged lands covered by navigable waters alienable by the State, or inalienable as part of the <i>jus publicum</i> ?	
3. Are they inalienable under a trust theory generally?	
4. Are they inalienable under a trust theory under the circumstances alleged in this Bill of Complaint?	
5. Did alienation under the circumstances alleged in this Bill of Complaint violate the Fifth and Fourteenth Amendments, and the Ninth Amendment, to the Constitution of the United States?	
6. Are the lands inalienable under the Maryland Constitution, and the Common Law of England which is in effect now in this State; or under Article 6, of the Declaration of Rights of Maryland?	2

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IN THE
Court of Appeals of Maryland

SEPTEMBER TERM 1970

No. 364

ELINOR H. KERPELMAN,
Appellant,

vs.

MARVIN MANDEL, Governor, LOUIS L. GOLD-
STEIN, Comptroller of the Treasury, and JOHN
LUETKEMEYER, Treasurer; constituting the
BOARD OF PUBLIC WORKS OF MARYLAND,
JAMES B. CAINE, INC., a Maryland Corporation,
and MARYLAND MARINE PROPERTIES, INC., a
Maryland corporation,
Appellees.

Appeal from the Circuit Court of Worcester County
(PRETTYMAN, J.)

APPELLANT'S BRIEF AND APPENDIX

STATEMENT OF THE CASE

This is an appeal from a judgment of the Circuit Court for Worcester County, Maryland, filed August 31, 1970, which was expanded and/or amended on September 22, 1970, (but the whole judgment of August 31, 1970, was appealed from) in which the Court entered a judgment dismissing the Appellant's Bill of Complaint for a Mandatory Injunction and for Declaratory Relief, as to all Defendants.

It is from the Order of August 31, 1970, expanded and amended on September 22, 1970, from which this appeal is entered against all Appellees, including James B. Caine, Inc., who has ostensibly been let out by Chief Judge Hammond.

QUESTIONS PRESENTED

1. Did the alienation of wetlands by the Board of Public Works of Maryland, and dismissal of the Bill of Complaint below amount to a taking of property of the individual Plaintiff, or of the class which she represents, without Due Process of Law in violation of the Fourteenth and Fifth Amendments to the United States Constitution, and in violation of the Ninth Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment?

2. Are submerged lands covered by navigable waters alienable by the State, or inalienable as part of the *jus publicum*?

3. Are they inalienable under a trust theory generally?

4. Are they inalienable under a trust theory under the circumstances alleged in this Bill of Complaint?

5. Did alienation under the circumstances alleged in this Bill of Complaint violate rights of the Plaintiff under the Fifth and Fourteenth Amendments, and the Ninth Amendment, to the Constitution of the United States?

6. Are the lands inalienable under the Maryland Constitution, and the Common Law of England which is in effect now in this State; or under Article 6, of the Declaration of Rights of Maryland?

STATEMENT OF FACTS

See the Bill of Complaint in the Appendix, pages 1 to 4; the allegations of the Bill of Complaint are here incorporated by reference.

It is undisputed, under the pleadings in this case, that certain submerged lands under navigable waters of this State in Worcester County, were conveyed by the Board of Public Works of Maryland, to certain real estate developers, for the purpose of filling the lands with mud and other substances, including buyers, so that they would become more or less dry land, and make for the developers millions of dollars.

These lands are, to coin a popular phrase, ecologically valuable, and continued filling of such similar lands in such similar manner, will be, in the long run, economically disastrous to the State and will change the quality of life for Mrs. Kerpelman and other citizens of the State, and of the Class Plaintiffs, traumatically downward, and perhaps disastrously so, if allowed to continue in other instances and in behalf of other potential millionaires, whose economic pressure and political campaign contributions, notoriously outrank those of many individual citizens, but whose cumulative interest in dollars alone, however, not even considering factors which are immeasurable in dollars, does not measure up to the cumulative interest of the citizens-in-common of the State who are represented as Class Plaintiffs in the suit.

ARGUMENT

I

The *Jus Publicum* is Inalienable

The Plaintiff's principle argument is based on the case of *Commonwealth of Virginia vs. City of Newport News* (1932), 164 S.E. 689, at 696.

The theory of that case is as follows, quoting from the case:

“Insofar as the sovereignty and governmental powers of the state are concerned, the object of the ordination of the Constitution is to provide for the exercise thereof *and not the abdication thereof*. It would therefore be a perversion of the Constitution to construe it as authorizing or permitting the Legislature or any other governmental agency to relinquish, alienate, or destroy, or substantially impair the sovereignty, or the sovereign rights, or governmental powers of the state. The police power, the power of right of eminent domain, and the power to make, alter and repeal laws are all attributes or inherent and inseparable incidents of sovereignty and the power to govern. For this reason, although no express provision may be found in a State Constitution forbidding the Legislature to surrender, alienate, abridge, or destroy these powers, there is always such a limitation to be implied from the object and purpose for which the Constitution was ordained. Of course, such sovereign powers must be exercised subject to such limitations upon exercise thereof by the Legislature as are provided in the Constitution.

“When we come to consider the powers of the state Legislature under the Constitution with reference to the *public domain*, it is necessary to take cognizance of the two different basic rights which the state has over and in the public domain.

“As sovereign, the state has the right of jurisdiction and dominion for governmental purposes over all the lands and waters within its territorial limits, including tidal waters and their bottoms. For brevity this right is sometimes termed the *jus publicum*. But it also has, as proprietor, the right of private property in all the lands and waters within its territorial limits (including tidal waters and their bottoms) of which neither it nor the sovereign state to whose rights it

has succeeded has divested itself. This right of private property is termed the *jus privatum*. *Farnum on Waters and Water Rights*, S. 10, S. 36a; *Gough vs. Bell*, 21 N.J.Law, 156; *City of Oakland vs. Oakland, etc. Co.*, 118 Cal. 160, 50 P.277.

"The jus publicum and all rights of the people, which are by their nature inherent or inseparable incidents thereof, are incidents of the sovereignty of the state. Therefore, by reason of the objects of purposes for which it was ordained, the Constitution impliedly denies to the Legislature the power to relinquish, surrender, or destroy, or substantially impair the jus publicum, or the rights of the people which are so grounded therein as to be inherent and inseparable incidents thereof, except to the extent that the State or Federal Constitution may plainly authorize it to do so. Farnham on Waters and Water Rights, S. 10, S. 36a; Illinois Cent. R. Co. vs. Illinois, 146 U.S. 387, 455, 13 S.Ct.110, 36 L.Ed.1018; Gough vs. Bell, 21 N.J.Law, 156. See, also, Greenleaf's edition of Cruise on Real Property, vol. 2, p.67, note.

"On the other hand, the power of disposition is of the very essence of the proprietary right of the state, its jus privatum. Therefore no implication against the exercise by the Legislature of the power or right to alienate and dispose of the lands and waters of the state can arise from the object and purpose, for which the Constitution was ordained, except such as arises from the existence and inalienability of the jus publicum.

"From this, however, necessarily arises this limitation. The Legislature may not by the transfer, in whole or in part, of the proprietary rights of the State in its lands and waters relinquish, surrender, alienate, destroy, or substantially impair the exercise of the jus publicum. Or, to state it differently, the Legislature may not make a grant of a proprietary right in or authorize, or permit the use of, the public domain, including the tidal waters and their bottoms, except subject to the jus publicum. . .

“See also *Illinois Cent. R. Co. vs. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed.1018.”

Emphasis has been supplied throughout for the assistance of this Honorable Court's efforts.

SUMMARY OF MAIN ARGUMENT

II

A Constitutional Amendment Would Be Necessary to Alienate These Lands

Rights held *jus privatum* then (see above), are alienable, but rights *jus publicum* are part of the sovereignty given over by the people to the state. They cannot be altered by statute, as the Legislature has no right to impair the sovereignty or sovereign rights. Rights of navigation are immemorially included. So, we contend, are rights “environmental” in nature. In either case, submerged lands could not be relinquished, except by CONSTITUTIONAL AMENDMENT by the people.

The English law as it prevailed in 1776 continues to be the law of Maryland, subject however, to the statutes of this State thereafter enacted *subject to Maryland constitutional provisions*. *In re Continental Midway Corp.* 185 F. Supp. 867. The *Newport News Case* is the anchor of this theory—that the *jus publicum* is constitutionally reserved.

III

Amendment Nine, U.S. Constitution

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

IV

Illinois Central v. Illinois

In *Illinois Central Railroad Co. vs. Illinois, supra*, the Court said, at page 1040:

“We shall hereafter consider what rights the company acquired as a riparian owner from its acquisition of title to lands on the shore of the lake, . . .

“We proceed to consider the claim of the railroad company to the ownership of submerged lands in the harbor, and the right to construct such wharves, piers, docks and other works therein as it may deem proper for its interest in it’s business. The claim is founded upon the third section of the act of the Legislature of this State passed on the 16th of April, 1869, the material part of which is as follows:

“Section 3. (The Illinois Central Railroad Co. is given) . . . all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater . . . (and these) . . . are hereby granted in fee to said Illinois Central Railroad Company, its successors and assigns.”

“The questions presented relate to the validity of the sections cited of the act . . .

“. . . As to the grant of the submerged lands, the act declares that all the right and title of the State in and to the submerged lands constituting the bed of Lake Michigan, . . .

“are granted in fee to the railroad company, its successors and assigns”.

“This clause is treated by the counsel of the company as an absolute conveyance . . . as if they were uplands, in no respect covered or affected by navigable waters, and not as a license to use the lands subject to revocation by the state. Treating it as such a convey-

ance, its validity must be determined by the consideration whether the Legislature was competent to make a grant of this kind . . .

‘The question . . . is whether the Legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; . . .

‘That the state holds title to the lands under the navigable waters of Lake Michigan within its limits, in the same manner that the state holds title to soils under tide water, by the Common Law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are opened to pre-emption and sale. *It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, free from the obstruction or interference of private parties.*

‘The interest of the people in the navigation of the waters, and the commerce over them, may be improved in the instances by the erection of wharves, docks, and piers therein, for which purposes the state may grant parcels of the submerged lands; and so long as the disposition is made for such purposes, no valid objections can be made to the grants . . . And grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjusted cases as a valid exercise of legislative power consistent with the trust to the public upon which such lands are held by the state . . . The trust devolving upon the state or the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can *never* be lost, . . .’

Thus the Maryland statute, by the test of *this* case, if the court chooses to follow this Supreme Court case, is unconstitutional, in allowing the Board of Public Works to dispose of any lands simply for a consideration which it deems to be adequate, when the test must be, under the dictates of this case, whether the alienation will produce *any substantial impairment of the public interest in the lands and waters remaining, regardless of the consideration.*

Continuing, in *Illinois Central vs. Illinois*, at page 1043:

“The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of navigation and use of the waters, parcels can be disposed of without impairment of the public interest in what remains, *than it can abdicate its police powers in the administration of government and the preservation of the peace . . .* So with trusts connected with public property, or property of a special character like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state . . .

“The idea that its Legislature can deprive the state of control over its bed and place the same in the hands of a private corporation created for a different purpose and limit it to transportation of passengers and freight between distant points and the city is a proposition that cannot be defended.”

And quoting Chief Justice Taney (a Marylander yet), the Court went on to say:

“The sovereign power itself, therefore, cannot consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a

grievance which never could be long borne by a free people.

“Many other cases might be cited wherein it has been decided that the bed or soil of navigable waters is held by the people of the state in their character as sovereign in trust for the public uses for which they are adapted. *Martin vs. Waddell*, 41 U.S. 16 . . . (Other citations).”

Then the Court went on to speak of the *jus privatum* and *jus publicum*.

V

The Illinois Central Railroad's Fare Is Reduced for the Trip to Worcester County

All of the above, the Worcester County Court cavalierly dismissed with a wave of the hand and the statement that . . . “Unless the law in force in the State of Maryland in which the Appellate decision has been rendered is identical with that in Maryland, the decision of the foreign jurisdiction, or the interpretation of a federal tribunal based upon the law of that foreign jurisdiction is neither persuasive nor controlling.” (! ! !)

Not Persuasive? Obviously not in Worcester County; controlling—well, does the Supreme Court control in Worcester County? Some think not, some think yes. Some love anarchy, especially in the innocent guise of “conservatism”, and so seems the Honorable Court below.

Then, after dispensing thus of Supreme Court holdings, Judge Prettyman with the wave of his other hand, states that:

“The individual states inherited the sovereignty over lands under navigable waters within the state, and granted unto them (sic) control and regulation of riparian rights, which the states were free to alienate . . .”

VI

"Riparian Rights"; Worcester County Style

Like a true Worcester Countian, the Judge assumes that "riparian rights" means the right to do everything, including dredging, filling, swiping all the oysters, building a housing development all the way out to the other shore, or paving over the whole bay.

The most fundamental perusal of Black's Law Dictionary, or of *Shively vs. Bowlby, infra*, will indicate, however, that riparian rights is a very exact and fixed term, which does not include any of these things, and includes very little more, if anything, than the right to "wharf out" to the deep portion of the stream, and to have continued access at all times to the navigable waters in front of the owner's property. See also Illinois Central Railroad on riparian rights.

This new and modern transmutation of that phrase into absolute control is a thought fond to the hearts of developers and Eastern Shoremen, ~~but is~~ but is not in accord with the state of the law now nor ever.

VII

Judge Prettyman's Willing Delight

Similarly, the learned jurist from Worcester County seems to find support for his amazing proposition in *Shively vs Bowlby*, 14 S.Ct. 548, 152 U.S. 1. He states that he "willingly and delightedly" adopts that decision. He states that the case "establishes the proposition that, consistent with the Common Law of England, the individual states inherited the sovereignty over lands under navigable waters within the state, and granted unto them (sic) control and regulation of riparian rights, which the states

were free to alienate according to the constitution and statutes of the respective states." (Part of this remarkable passage was quoted before.)

It is hard to understand how the proposition can be stood on its head so!

There is, indeed, in *Shively vs. Bowlby*, language slightly similar to that quoted above.

It is the following (at page 58, column 1, of 152 U.S.):

"In common law, the title and dominion in lands flowed by the tide were in the King, for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, *charged with a like trust*, were vested in the original states, within their respective borders, subject to the rights surrendered by the Constitution to the United States."

Compare also the following in *Illinois Central vs. Illinois*, *supra* at 1042 of 146 U.S.:

"The State holds the title to the lands under . . . navigable waters . . . But it is a title different in character from that which the State holds in lands intended for sale.

". . . It is a title held *in trust* for the people of the State that they may enjoy the navigation of the waters."

Illinois too had passed a Statute in derogation of the Common Law!! See p. 1041 of 146 U.S. col. 1 par. 2.

The learned jurist below seems to not understand what "in trust" means. Or perhaps he didn't see the words there. To err is human, to be an Eastern Shoreman, divine.

The learned Court below stated that in *Shively vs. Bowlby*, it was "determined that the United States had no power to make such a grant, because the Federal Government held the land in trust, pending the formation of a new

state. If one will read the last ten paragraphs of that Opinion, the thrust of the entire Opinion will become most evident.”

One reads, in one of the last ten paragraphs, then, the following:

“Upon the American Revolution, these rights, *charged with a like trust* were vested in the original states. . .”

The trust was similar to that under which the King held the *jus publicum*.

None other.

Not the type of trust under which an Eastern Shoreman holds property from the edge of the Atlantic Ocean all the way across to the banks of the river Clyde.

VIII

Statutes in Derogation of Common Law Strictly Construed

Furthermore, Sutherland on Statutory Construction, 3rd Ed., (1970 Cumulative Supplement), states, in Chapter 62, “Statutes in Derogation of the Common Law”, Section 6201, that:

“Where it is claimed that a statute imposes a duty or burden, or establishes a right or benefit which was not recognized by the common law, the statute will be given a strict interpretation to avoid the change asserted.”

Citing 67 Md. 139, *U.S. Casualty Co. vs. Byrne*.

“This rule of statutory interpretation has received wide adoption, . . .”

Citing Pound, *Common Law and Legislation* (1908), 21 H.L.R. 383. In that article, Professor Pound states:

“The ‘natural rights doctrine’ has been repressed both in England and the United States, but statutes changing the common law, or imposing upon the ‘common right’ have continued to receive a strict construction.”

IX

Constitutional Amendment Necessary

In short, a constitutional amendment would be necessary to allow the state to dispose of land held in the capacity *jus publicum*. A mere statute, such as, Section 15 of Article 78A cannot accomplish this.

The State has given away then, that which was not the State's to give away.

Thus, property of the Appellant, which is owned in common with all other citizens of the State, was taken from her without either amendment of the State Constitution, or any other Due Process of Law required by the Fifth and Fourteenth Amendments to the United States Constitution; rights reserved in her in common with other citizens of the State under the Ninth Amendment to the Constitution of the United States were taken away from her by the action of the Worcester County Court and the Board of Public Works, in taking away this property owned by her, with a commonality of title, together with all other citizens of the State.

Further arguments, it is respectfully suggested, may be found in the “Plaintiff's Memorandum of Law”, which has been filed in the case, but which is far too extensive to reprint here, the Appellant's finances being what they are. Copies for the Court have been filed.

Additional copies may be obtained from counsel for the Appellant at \$2.40 each.

CONCLUSION

Wherefore, the Appellant respectfully prays that the Judgment and Order of the Circuit Court for Worcester County dismissing the case as to all Defendants, on August 31, expanded and amended on September 22, be reversed, and that the case be remanded for further proceedings.

Respectfully submitted,

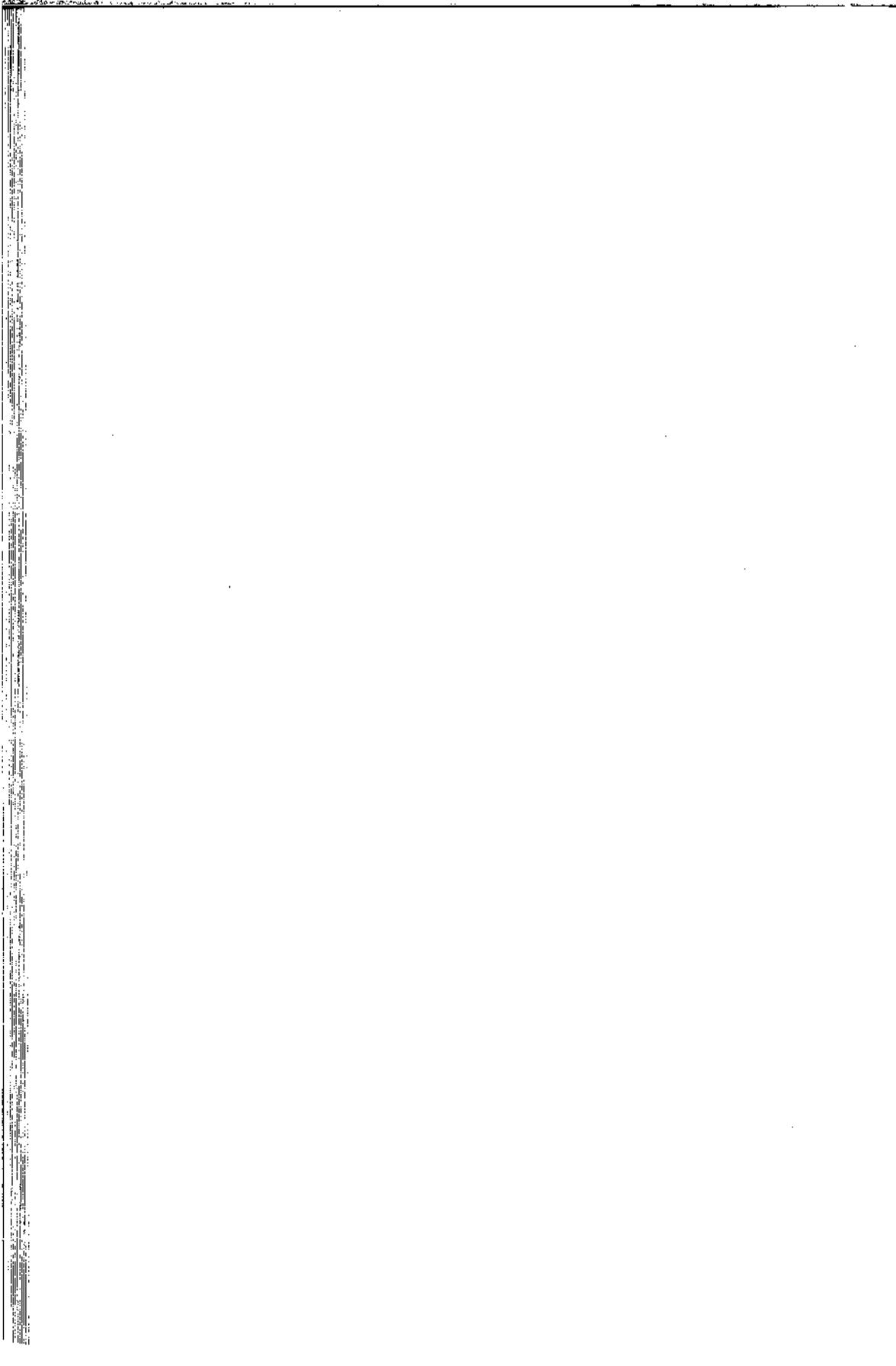
LEONARD J. KERPELMAN

Attorney for Appellant.

2403 Rogers Building

Baltimore, Maryland 21209

SA 7-8700



APPENDIX

BILL OF COMPLAINT FOR A MANDATORY INJUNCTION, AND FOR DECLARATORY RELIEF

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Now comes Elinor H. Kerpelman, your Complainant, by Leonard J. Kerpelman, her Solicitor, and says:

1. That she is a taxpayer of the State of Maryland, and a resident thereof, in Baltimore City; this suit is brought on her own behalf, and on behalf of all others similarly situated.

2. The Defendant Board of Public Works of Maryland, hereinafter sometimes referred to as "Board of Public Works" or "Board", is charged by law, in Article 78A, Section 15 of the Annotated Code of Maryland, with the authority to dispose of lands of the State of Maryland by sale or otherwise *providing* this is done for "a consideration adequate in the opinion of the Board of Public Works . . ."; but also, by Article 6 of the Declaration of Rights of the Maryland Constitution, the Defendant Board Members, individually are "Trustees of the Public", in all that they do, and must reasonably exercise this fiduciary charge, particularly as to their stewardship of property.

3. In 1968, contrary to said Article 6 Trusteeship, and without the necessary opinion as to adequacy, the Defendant Board of Public Works, then composed in part of different membership, but being the same constitutional and statutory Board as the present Defendant Board, conveyed 190 acres of lands which were then the property of the people of the State of Maryland, unto the Defendant James B. Caine, Inc.; and unto the Defendant Maryland Marine Properties, Inc., 197 acres of Maryland lands; or did so by mesne conveyances both for a totally inadequate and insufficient consideration, compared with the then fair market value or intrinsic value of the said lands, and the said Board then had no opinion upon the monetary adequacy

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of the consideration proffered, or had a mistaken, unreasonable, or totally false opinion of such adequacy, that said conveyances, to the other Defendants respectively were therefore illegal, void, and a nullity as not complying with the necessary precondition set forth as to adequacy in said Art. 78A, Sec. 16; and as a violation of the Trusteeship imposed by Article 6 of the Declaration of Rights. The consideration for the said conveyances was also totally inadequate and insufficient considering the ecological consequences of the sale, and the direct consequent effect upon the natural resources of the State of Maryland, which are owned by the Complainant and all others similarly situated, and which are held in trust for her and the class which she represents in the within suit by the State of Maryland and its public officials including the Defendant Board.

4. The said lands referred to in paragraph 3 hereof, lay in Worcester County, and were marshlands and wetlands, which is to say, submerged and partially submerged lands, marshes, and shallows, peculiarly adapted to the production of certain important forms of marine life, and constituting an important link in the food chain of many economically valuable wild species of fish, animal and bird life, which abound in Maryland, and upon her waters, and which are owned in common, and used by all of the members of the class on whose behalf this suit is brought.

5. Said lands which were conveyed are intended to be, and are being, filled in and built up by those to whom they were conveyed, and their character as wetlands and marshlands is being completely obliterated, with the consequent destruction of support to said fish and animal species aforesaid referred to in paragraph 4.

6. The lands aforesaid which were sold to Maryland Marine Properties, Inc., were sold by an exchange for other marshlands and wetlands, which are cumulatively only one-half as productive of the important species of marine life and products as those which were conveyed to the said Maryland Marine Properties, Inc.; those sold to the defendant James B. Caine, Inc., were sold for a completely

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and totally inadequate money consideration, namely one hundred dollars per acre. Said lands which were sold to Maryland Marine Properties, Inc., were exchanged for wetlands and marshlands as aforesaid worth only \$41,000.00, while the lands conveyed to it were worth two hundred times as much in fair market monetary value; the lands conveyed to James B. Caine, Inc. were worth approximately five hundred times as much in fair market monetary value as the monetary consideration received by the Defendant Board of Public Works.

7. Said monetary consideration paid to Maryland was, in each case, so completely and totally inadequate as was known to all parties at that time as to amount to a conveyance of the land by the Defendant Board of Public Works fraudulently, or by mistake, or by undue influence exerted upon it.

8. The Complainant and all other similarly situated, will be irreparably injured and damaged and have been so, by the said conveyances to the defendants, Maryland Marine Properties, Inc., and James B. Caine, Inc., in that valuable property, which is ecologically irreplaceable, owned by them or held in trust for them by the Defendant Board of Public Works, has been disposed of, and closed off to the wild natural resource cycle which it was a most essential, irreplaceable part of, and the Complainant and all others similarly situated are deprived of their use and benefit, which they otherwise would have, in return for a totally inadequate consideration and in return for a totally inadequate contribution by new owners of the said lands into the state treasury by way of real estate taxes paid and to be paid, the value of which taxes will never compensate for the deprivation of said lands and the irreparable damage and injury which will be caused to the natural products and natural resources of the State of Maryland by the ecological disruption caused by the filling and loss of said wetlands, marshlands and shallows; which disruption may reasonably be expected to cause or substantially contribute to, natural resource and wildlife losses of many millions of dollars measured in financial terms alone.

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9. The Defendant corporations and proceeding with great speed to fill in and eradicate as marshland and wetland, the lands in question.

10. The Complainant has no adequate remedy at law.

WHEREFORE, the Complainant prays:

(a) That this case be advanced on the Court Docket for immediate trial, and hearing on any motions which may be filed.

(b) That a Mandatory Injunction may issue, requiring the Defendants, Maryland Marine Properties, Inc., and James B. Caine, Inc., to reconvey to the State of Maryland, those lands in Worcester County, which are the subject of the within suit.

(c) That the Court declare the Deeds of Conveyance or mesne Deeds of Conveyance made by the Board of Public Works of Maryland of lands in Worcester County, Maryland, unto Maryland Marine Properties, Inc., and James B. Caine, Inc., which conveyances were made in 1968, of 197 acres and 190 acres, respectively, more or less, to be null, void, and of no effect, and that title remains in the People of Maryland.

(d) That the Complainant may have such other and further relief as the nature of her case may require.

AND, AS IN DUTY BOUND ET CETERA.

LEONARD J. KERPELMAN,
Attorney for Complainant
500 Equitable Building
Baltimore 2, Maryland
SA 7-8700

ELINOR H. KERPELMAN

DEMURRER OF DEFENDANT MARYLAND
MARINE PROPERTIES, INC.

Defendant, Maryland Marine Properties, Inc., by its attorneys, Raymond D. Coates, Thomas P. Perkins III and Robert A. Shelton, demurs to the Bill of Complaint filed by

Plaintiff, Elinor H. Kerpelman, herein and to each and every paragraph thereof and as grounds for said Demurrer states as follows:

1. Plaintiff has totally failed to allege any facts which would be sufficient to constitute a cause of action or entitle her to the relief as prayed in the Bill of Complaint.
2. Plaintiff has totally failed to allege sufficient facts to establish her standing to sue in this case.
3. Plaintiff is barred by laches.
4. Such other and further grounds as will be set forth at the hearing on this Demurrer.

WHEREFORE, Defendant, Maryland Marine Properties, Inc., prays that this Honorable Court sustain its Demurrer without leave to amend, that the Bill of Complaint be dismissed as against Defendant, Maryland Marine Properties, Inc. and that Defendant be awarded its cost of this suit.

/s/ Raymond D. Coates
/s/ Thomas P. Perkins, III
/s/ Robert A. Shelton

MOTION NE RECIPIATUR TO DEMURRER OF
MARYLAND MARINE

The said "Demurrer", and paragraph number 3 thereof, states "Plaintiff is barred by laches"; the defense of "laches", is a factual defense, and has no proper place in a demurrer; the Plaintiff being confronted by a demurrer containing such material knows not how to meet the matter to be presented upon argument or briefing, and is unable therefore to reasonably prepare for the presentation of his defense to the demurrer.

LEONARD J. KERPELMAN
Attorney for Plaintiff

DEMURRER OF BOARD OF PUBLIC WORKS

The Board of Public Works, a Defendant, by Francis B. Burch, Attorney General, Jon F. Oster, Assistant Attorney General, and Richard M. Pollitt, Special Attorney, its attorneys, demurs to the Bill of Complaint and to each and every paragraph thereof because:

1. The Bill does not state a cause of action.
2. The Bill does not allege facts amounting to a cause of action.
3. The Bill does not allege facts sufficient to support the relief prayed.
4. Article 78A, Section 15 of the Annotated Code of Maryland (1965 Replacement Volume) provides:

“Any real or personal property of the State of Maryland or of any board, commission, department or agency thereof, and any legal or equitable rights, interests, privileges or easements in, to, or over the same, may be sold, leased, transferred, exchanged, granted or otherwise disposed of to any person, firm, corporation, or to the United States, or any agency thereof, or to any board, commission, department or other agency of the State of Maryland for a consideration adequate in the opinion of the Board of Public Works, or to any county or municipality in the State subject to such conditions as the Board of Public Works may impose. If said real or personal property of the State of Maryland, disposed of hereunder, or any legal or equitable rights, interests, privileges or easements in, to, or over the same is under the jurisdiction or control of any board, commission, department or other agency of the State, the deed, lease or other evidence of conveyance of any such property or right or interest therein, disposed of hereunder, shall be executed on behalf of such board, commission, department or agency of the State, by the highest official thereof, and by the Board of Public Works, and if any of said real or personal property or any legal

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or equitable rights, interests, privileges or easements in, to, or over the same, disposed of hereunder, is not under the jurisdiction or control of any particular board, commission, department or other agency of the State, the deed, lease or other evidence of conveyance of said property or interest therein shall be executed by the Board of Public Works only; provided, however, that whenever any State department, agency or commission leases State-owned property under its jurisdiction and control to any State employee, agent, servant or other individual in State service for purposes of permitting such person to maintain a residence therein, such lease shall be executed by the department, agency or commission having such control or jurisdiction over such property, and, additionally, shall be approved by the budget Director, which approval shall be a condition precedent to the validity of the lease. All such conveyances shall be made in the name of the State of Maryland acting through the executing authority or authorities herein provided for. As used herein, the term 'real or personal property or any legal or equitable rights, interests, privileges or easements in, to, or over the same, shall include the inland waters of the State and land under said waters, as well as the land underneath the Atlantic Ocean for a distance of three miles from the low watermark of the coast of the State of Maryland bordering on said ocean, and the waters above said land. If the consideration received for the disposition of any real or personal property or interest therein is other real or personal property, such property so received shall be held and accounted for in in the same manner as other property within the jurisdiction and control of the board, commission, department or other agency of the State receiving such property. If the consideration received for any such disposition is cash, in whole or in part, the proceeds shall be accounted for and remitted to the State Treasurer; except that any consideration received in cash for the disposition of an asset of a substantial per-

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manent nature, commonly called a capital asset, shall be applied solely to the State Annuity Bond Fund Account for the payment of the principal and interest of the bonded indebtedness of the State and if such capital asset shall have been originally purchased with any special funds, the proceeds thereof shall revert to such fund only."

Said statute imposes no limitation upon the power of the Board of Public Works to dispose of the property which is the subject of this suit, and the Board was authorized as a matter of law to dispose of the property complained about.

5. There is no allegation that the alleged alienation of State property was not "for a consideration adequate in the opinion of the Board of Public Works" as provided in the statute.

6. There is no allegation that the procedure of the Board of Public Works in connection with its disposition of the subject property was improper, defective or in any manner contrary to law.

7. The exercise of discretion of an administrative agency, if it acts within the scope of its authority, is not subject to review by a court of equity unless its power is fraudulently or corruptly exercised. *Hanna v. Bd. of Ed. of Wicomico Co.*, 200 Md. 49.

8. And for other reasons to be shown at the hearing of this Demurrer.

FRANCIS B. BURCH
Attorney General

JON F. OSTER
Assistant Attorney General

RICHARD M. POLLITT
Special Attorney

Attorneys for Defendant
Board of Public Works

MOTION RAISING PRELIMINARY OBJECTION

James B. Caine, Inc., one of the Defendants, by Sanford and Bolte, its Solicitors, moves this Court pursuant to Rule 323 (A) (1) of the Maryland Rules for an Order dismissing the Bill of Complaint filed herein and as grounds for this Motion alleges that this Court lacks jurisdiction over the subject matter of said Bill of Complaint, since it involves a political question and not a justifiable question.

SANFORD AND BOLTE

ANSWER TO MOTION RAISING
PRELIMINARY OBJECTION

Now comes Elinor H. Kerpelman, by Leonard J. Kerpelman, her solicitor and for answer to Motion Raising Preliminary Objection, says:

1. That questions raised by the Bill of Complaint are, substantially, two:
 - A. The Board of Public Works of Maryland alleged to convey lands which it had no alienable title to, to the other Defendants.
 - B. The conveyance was for such a completely and totally inadequate consideration, that the Board of Public Works could not have had a bona fide opinion that the consideration was adequate, and therefore fraud is inferred by the Complainant.
2. It is not seen how, in any sense A, could be said to be a political question by any stretch of any except of most fertile imagination question B could be so; however, it is denied, to be perfectly clear and explicit, that either is a "political question".

LEONARD J. KERPELMAN
Attorney for Complainant

MOTION FOR SUMMARY JUDGMENT UPON
SOME ISSUES

Now comes Elinor H. Kerpelman, Plaintiff, by Leonard J. Kerpelman, her Attorney, and says:

That there is no dispute as to any material fact concerning the following issues in the above-entitled case:

- a. That she is a taxpayer of the State of Maryland.
- b. That she is a resident thereof in Baltimore City.
- c. That this suit is brought on her own behalf, and on behalf of all others similarly situated.

LEONARD J. KERPELMAN
Attorney for Plaintiff

DEMURRER OF DEFENDANT JAMES B. CAINE, INC.

James B. Caine, Inc., one of the Defendants, by Sanford and Bolte, its attorneys, demurs to the Bill of Complaint filed herein and to each and every paragraph thereof, and as grounds for said Demurrer states as follows:

1. Plaintiff has totally failed to allege any facts which would be sufficient to constitute a cause or action or entitle her to the relief as prayed in the Bill of Complaint.
2. Plaintiff has totally failed to allege sufficient facts to establish her standing to sue in this case.
3. Plaintiff is barred by laches.

In support of said Demurrer, this Defendant adopts the arguments heretofore made by the other Defendants herein, and also the Opinion of this Honorable Court relating to such Demurrers, which is dated August 31, 1970 and filed in this proceeding.

WHEREFORE, Defendant James B. Caine, Inc. prays this Honorable Court to sustain its Demurrer without leave to amend, to the end that the Complainant pay the costs of this proceeding.

SANFORD AND BOLTE

OPINION AND ORDER OF COURT [AUG. 31, 1970]

This is another one of those cases in which rulings required upon pleadings now before the Court for determination can obscure the principal issue presented to the Court at the time of the Hearing on the pleadings on May 11, 1970.

On September 30, 1969, the Complainant filed a "Bill of Complaint For A Mandatory Injunction, And For Declaratory Relief". Upon the reading of the Bill, however, and the prayers for relief, it becomes apparent that the complaint does not actually state a typical cause of action as usually embraced in a petition for a declaratory decree or declaratory judgment. In other words, the Bill does not actually seek a declaration of rights of the parties, but seeks the specific relief as requested in the said prayers, the contents of which follow:

"WHEREFORE, the Complainant prays:

- (a) That this case be advanced on the Court Docket for immediate trial, and hearing on any Motions which may be filed.
- (b) That a Mandatory Injunction may issue, requiring the Defendants, Maryland Marine Properties, Inc., and James B. Caine, Inc., to reconvey to The State of Maryland those lands in Worcester County which are the subject of the within suit.
- (c) That the Court declare the Deeds of Conveyance or Mesne Deeds of Conveyance made by the Board of Public Works of Maryland of lands in Worcester County, Maryland, unto Maryland Marine Properties, Inc., and James B. Caine, Inc., which conveyances were made in 1968, of 197 acres and 190 acres, respectively, more or less, to be null, void, and of no effect, and that title remains in the People of Maryland."

To this Bill of Complaint, the Defendant Maryland Marine Properties, Inc. filed its Demurrer on October 20, 1969, together with an extensive memorandum raising three

specific issues; namely, (1) a failure to allege sufficient facts to constitute a cause of action, (2) attacking the standing to sue of the Plaintiff, and (3) raising the question of laches. On October 21, 1969, the Defendant Board of Public Works filed its Demurrer citing the provisions of Section 15 of Article 78A of The Annotated Code of Maryland, and the authority of the Board of Public Works of Maryland as therein set forth, contending that, in the absence of any allegation of fraud or the facts supporting such an allegation, no cause of action was sufficiently stated to subject the actions of the Board of Public Works to the scrutiny of a Court of Equity.

On October 21, 1969, James B. Caine, Inc., one of the Defendants, filed a "Motion Raising Preliminary Objection", alleging the lack of jurisdiction of this Court over the subject matter of the Bill, on the grounds that a determination involved a "political question", and "not a justiciable question".

On November 6, 1969, the Complainant filed a "Reply To 'Memorandum of Law of Maryland Marine In Support of Demurrer'".

On November 7, 1969, the Complainant filed a "Motion Ne Recipiatur To Demurrer Of Maryland Marine", based upon contention that the Demurrer raised a question of laches which should be considered as a factual defense rather than a subject of a demurrer.

On November 17, 1969, the Complainant filed an "Answer To Motion Raising Preliminary Objection", denying the nature of the question to be "political", and summarizing the contentions of the Bill as being (a) that the Board of Public Works enjoyed no alienable title to the lands in question, (b) that "[t]he conveyance was for such a completely and totally inadequate consideration, that the Board of Public Works could not have had a bona fide opinion that the consideration was adequate, and therefore fraud is inferred by the Complainant".

On January 26, 1970, an organization allegedly known as "North American Habitat Preservation Society" filed a

“Petition To Intervene As Plaintiffs”, upon which the Court issued a Show Cause Order to the Defendants ordering them to show cause on or before February 16, 1970, if any they had, why the said Petition to Intervene should not be granted. The Defendant Maryland Marine Properties, Inc., filed its Answer to the Petition to Intervene, on February 24, 1970, alleging insufficient facts to establish the standing of the Petitioners to sue. On February 27, 1970, the Defendant, James B. Caine, Inc., filed a “Motion Ne Recipiatur As To Petition To Intervene As Plaintiffs”, alleging the non-receipt of a copy of the said Petition, the existence of which the attorney for the said Defendant allegedly accidentally discovered in the office of the Clerk of this Court, on February 24, 1970.

On March 11, 1970, the Complainant filed a “Motion Ne Recipiatur” to the Motion Ne Recipiatur of the Defendant James B. Caine, Inc., founded upon the grounds that the Caine Motion was based upon “facts not apparent from the face of the record, and yet was not under affidavit”. Interestingly enough, no copy of the Complainant’s Motion Ne Recipiatur was apparently served upon the Defendant James B. Caine, Inc., or any of his attorneys until May 13, 1970, after which an amended certificate of mailing was apparently intended to be filed by the attorney for the Complainant on March 16, 1970.

On May 5, 1970, the Plaintiff filed a Memorandum of Law, the main body of which was a photo-copy of a memorandum filed, on September 15, 1969 in a similar case in the Circuit Court for Baltimore City.

On May 6, 1970, the Defendant James B. Caine, Inc., filed a “Memorandum In Support Of Preliminary Objection”, the main body of which was a photo-copy of a brief filed in the same similar case in the Circuit Court for Baltimore City.

On May 11, 1970, the Complainant filed a “Motion For Summary Judgment Upon Some Issues”, alleging “no dispute as to any material fact concerning the following issues”; namely, (a) [t]hat she is a taxpayer of the State of Maryland, (b) [t]hat she is a resident thereof in Balti-

more City, and (c) [t]hat this suit is brought on her own behalf, and on behalf of all others similarly situated."

The Hearing was held on May 11, 1970 on all Demurrers, Motions, Petitions, etc., consistent with the notice of the assignment thereof mailed to all parties on April 8, 1970.

On May 15, 1970, the Complainant filed as "Answer To Memorandum Of Law Of Defendant James B. Caine, Inc.", in which the Complainant suggested that "counsel has missed the point", because of the contention of the Complainant that "nobody" has an alienable title to the lands in question.

On June 17, 1970, the Complainant filed a "Supplementary Plaintiff's Memorandum Of Law", in which the Complainant stated to the Court that she was adopting the entire theory set forth in the case of Commonwealth of Virginia vs. City of Newport News, 164 S.E. 689, at page 696, and quoted from that case the theory upon which she relied.

Petition to Intervene

The first duty of the Court is obviously to dispose of the Petition to Intervene filed on behalf of the "North American Habitat Preservation Society", for whom Leonard J. Kerpelman, Esq. is "solicitor" as well as being the attorney for the Complainant. Based entirely upon the facts set forth in the said Petition as to the nature and composition of the said Society, and the interest which it has in this case, the Court has determined that it lacks standing to sue as a party Plaintiff, and therefore its Petition to Intervene would be denied. *Horace Mann League vs. Board*, 242 Md. 645, at page 652. *Citizens Committee vs. County Commissioners*, 233 Md. 398, *Bar Association vs. District Title Co.* 224 Md. 474, and *Greenbelt vs. Jaeger*, 237 Md. 456.

A certain R. Doyle Grabarck, Box 869, Adelphi, Maryland, 20783, has likewise joined as a Petitioner in the said Petition to Intervene, both as President of the said Society, and individually. As President of the Society, the Court would consider his capacity to sue to be co-existent with the Society, and of no greater magnitude. As an individual,

however, he is apparently in the same position as the Complainant, Elinor H. Kerpelman, and the determination as to her standing will likewise be determinative of the standing of Mr. Grabarek. It seems also to follow that a determination of the contentions and issues raised by the Complainant would likewise be determinative of the contentions and issues raised by Mr. Grabarek, particularly in view of the fact that each are represented by Mr. Kerpelman. Indeed, by paragraph 4 and 5 of the Petition to Intervene, the Petitioners have so stated, and have adopted the position of the Complainant. There is one major difference, however, between the Petitioner Grabarek and the Complainant Kerpelman. That difference is the fact that nowhere in the Petition to Intervene is it alleged that Mr. Grabarek is a taxpayer of the State of Maryland. The Petition to Intervene, therefore, by R. Doyle Grabarek, as an individual, will be, likewise, denied.

Motions Ne Recipiatur

The determination by the Court upon the Petition to Intervene, as hereinbefore set forth, makes unnecessary a consideration of the Motion Ne Recipiatur filed by the Defendant James B. Caine, Inc., or the Motion Ne Recipiatur filed by the Complainant to the Caine Motion Ne Recipiatur. It might be well for the Court to observe, however, that Counsel for the Complainant had due notice of the appearance of Lee W. Bolte, Esq., and the firm of Sanford and Bolte, on behalf of the Defendant James B. Caine, Inc., as early as October 21, 1969, upon the filing of the Caine Motion Raising Preliminary Objection. Mr. Kerpelman recognized this appearance in his service of November 4, 1969 of his "Reply", his Motion filed on November 7, 1969, and his Answer filed on November 17, 1969. He did ignore the appearance in his service of the said Petition to Intervene. The apparent failure of Counsel for Maryland Marine Properties, Inc., to receive a copy of the said Petition to Intervene is the fact that Mr. Kerpelman used an inadequate address therefor, according to his Certificate of Service, in that he omitted any reference to room numbers. The Clerk of this Court can hardly be held responsible for this

defect in view of the fact that in his undated Certificate of Service of the said Petition to Intervene, Mr. Kerpelman alleged service upon a certain "Joseph H. Young, Esq., 901 First National Bank Bldg., Baltimore, attorney for James B. Caine, Inc." The Clerk would have no way of knowing whether or not additional Counsel for the Caine Corporation was now in the case, and had simply failed to enter his appearance of record. Perhaps the Clerk, however, should be more careful, and require that the Certificate of Service by an attorney be dated, and that all attorneys of record be included within such Certificate.

Motion Raising Preliminary Objection

The Court should then next consider the preliminary objection raised by the Defendant James B. Caine, Inc., upon the question of whether or not the Bill of Complaint merely stated a political question, and not a justiciable issue. Granting that a reading of the Bill of Complaint would make it difficult to delineate a justiciable issue, and that the Bill appears to be more in the nature of a statement of a political position, requiring legislative attention or executive restraint, the memoranda subsequently filed on behalf of the Complainant have had the salutary effect of interpreting the meaning of the Bill of Complaint and articulating a position which presents a legal issue. In view of this subsequent elucidation, by counsel for the Complainant, the Court will entertain jurisdiction, and render a decision upon the issue as narrowly framed and presented to the Court by Complainant's Memoranda. The Motion of the Defendant James B. Caine, Inc., raising this preliminary objection will be overruled.

*Motion Ne Recipiatur of Complainant to
Demurrer of Maryland Marine
Properties, Inc.*

The Court will entertain the Demurrer of the Defendant Maryland Marine Properties, Inc., and deny the Motion Ne Recipiatur filed thereto by the Complainant. In his Motion Ne Recipiatur thereto, Counsel for the Complainant

has over simplified the law with regard to the inclusion of a charge of laches in a demurrer.

“The defense of limitations or laches may be raised on demurrer where, on the face of the bill, it can be seen that it is a bar. Although, ordinarily, the defense of laches must be made by answer alleging facts showing lapse of time and prejudice to the Defendant, as discussed supra §142, where the bill on its face shows both lapse of time and circumstances as suggest prejudice or acquiescence and call for explanation, the bill is demurrable.” 9 M. L. E. “Equity”, Section 152, and cases therein cited, including the 1969 Pocket Part.

The Court will concede that the question of whether or not a case of laches is presented within the four corners of the Bill of Complaint is indeed a close one, but if the question of laches was the only question before the Court for determination in this proceeding at this time, the Court would insist upon a Hearing to spread the facts upon the record, particularly as they relate to prejudice to the Defendant Maryland Marine Properties, Inc. The Court, therefore, would take the position that it would not sustain the Demurrer on that grounds alone, but defer it as a matter of defense. Such a position by the Court, however, does not dispose entirely of the matter now for determination. The fact that a demurrer contains an invalid, unsupported or otherwise irrelevant issue, or the fact that the grounds assigned do not meet the approval of counsel for the opposing party or the Court does not justify the rejection of the pleading in toto. Even if one of the grounds assigned in a demurrer is found to be lacking in legal efficacy, the remaining grounds, if any there be, survive and are entitled to the consideration of the Court. Such is the situation presented here.

Demurrers

The Court is well aware of, and has had several opportunities to apply, the position of the Court of Appeals of Maryland with regard to demurrers filed in opposition to petitions for declaratory relief. Kelley vs. Davis, 233 Md.

494. As mentioned early in this Opinion, however, this Court does not envision the Bill of Complaint in this case to state the grounds for, or the request for, a declaration of the rights of the parties. The declaration which the Complainant seeks is merely a declaration to support the issuance of the "Mandatory Injunction" which she prays. In other words, it would be necessary to "declare" invalid the conveyances referred to within the Bill and in prayer for relief "(e)" in order to grant the relief prayed in "(b)" of the prayers for relief. There is no basis for, or necessity for, any other, further, or fuller declaration of rights of the parties. The Court is, therefore, of the opinion that the rule against entertaining a demurrer to a petition for declaratory relief is not appropriate to this particular proceeding, and should not be applied hereto.

The Court will attempt to state the position of the Complainants insofar as it presents a legal issue to be resolved herein. The Complainant adopts the position that title to lands under tidal waters vested in the King of England, for the benefit of the nations, passed to the Colonies under the Royal Charters granted therefor, in trust for the communities to be established, and upon the American Revolution, passed to the original States to be held by the officials thereof in trust for the people within the boundaries of the respective States, subject only to the rights surrendered by the Constitution of the United States to the Federal Government for the regulation of navigation. The trust which she envisioned is one which covers the entire *jus publicum* and vests in the trustee an irrevocable and inalienable title to such property. In support of her position in regard to such a trust, she narrowly construes the first portion of Article 6 of the Declaration of Rights of the Constitution of Maryland, of 1867, which reads:

"Art. 6. That all persons invested with the Legislative or Executive powers of Government are the Trustees of the Public and, as such, accountable for their conduct: . . ."

She is further contending that such being the alleged common law of England, the General Assembly of Maryland, or apparently any Provincial legislature, is not, and

never has been, empowered or authorized to change or modify that common law. As authority for that provision, she cites a portion of the content of Article 5 of the Declaration of Rights of the Constitution of Maryland, of 1867, the portion which she cites being as follows:

“Art. 5. That the Inhabitants of Maryland are entitled to the Common Law of England, . . .”

At this point, perhaps it would be well that the Court quote the remainder of Article 5 of the Declaration of Rights, with the emphasis by underlining being supplied by the Court:

“Art. 5. That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English Statutes as existed on the Fourth day of July, 1776; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, 1867; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; *subject, nevertheless, to the revision of, an amendment or repeal by, the Legislature, of this State.* And, the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by His Majesty Charles I to Caecilius Calvert, Baron of Baltimore.”

There is no substantial difference between that portion of the 1867 Constitution of Maryland and paragraph 3 of the Declaration of Rights of the First Constitution of Maryland, as reported by Kilty, Volume 1, The Laws of Maryland 1799 Edition. It reads as follows:

“III. That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by jury according to the course of that law, and to the benefit of such of the English statutes as existed at the time of their first emigration and which by experience have been found applicable to their local and other circumstances, and of such others as have been since

made in England or Great Britain, and have been introduced, used and practiced by the Courts of Law or Equity; and also to all acts of assembly in force on the first of June, 1774, except such as may have since expired, or have been, or may be altered by acts of convention, or this declaration of rights; *subject nevertheless to the revision of, and amendment or repeal by, the Legislature of this State*: and also the Inhabitants of Maryland are also entitled to all property derived to them from or under the charter granted by His Majesty Charles I to Caecilius Calvert, Baron of Baltimore."

If, as Counsel for the Complainant has stated in his Supplementary Memorandum, the Court was impatient at the Hearing with the persistent argument of Counsel with regard to the elements of the Common Law doctrine, perhaps it was because of the clear exception in the Declaration of Rights as hereinbefore set forth, and the almost incontestable legal understanding that the Legislature of Maryland is at liberty, and in the conscientious performance of its duties, must, from time to time, change the Common Law through statutory enactments in order to meet the changing conditions of time and history. *Lutz vs. State* 167 Md. 12, *Heath vs. State*, 198 Md. 455, *Goldenberg vs. Federal Finance*, 150 Md. 298, 5 M.L.E. "Common Law", Section 3. The adoption of any proposition that would abrogate, nullify and destroy the great body of law in Maryland, including enactments of the General Assembly, except so much thereof as interpreted and applied the Common Law of England prior to 1776 and the treatment of subjects not contemplated by that common law, is so illogical, unreasonable, and disastrous in its consequences as to be almost incomprehensible. The Court supposes that this is the reason why the point had not been more frequently pressed upon the Courts of this State in the past.

The Court is indebted, however, to Counsel for the Complainant for urging upon the Court the controlling nature of the opinion of the Supreme Court of the United States in *Shively vs. Bowlby*, 14 Sup. Ct. 548, 152 U. S. 1. The Court willingly and delightedly adopts the decision therein to be

determinative of the issues presented by the Complainant for resolution in this proceeding. Unfortunately, Counsel for the Complainant has misread the case, and has appropriated wording from that case, out of context, to attempt to support the position of the Complainant herein.

That case establishes the proposition that, consistent with the Common Law of England, the individual States inherited the sovereignty over lands under navigable waters within the State, and granted unto them control and regulation of riparian rights, which the States were free to alienate according to the constitution and statutes of the respective States. In a most helpful and extensive treatment of the entire subject matter of riparian rights as they existed within the original thirteen states, and as, by virtue of that opinion, extended to the new states admitted into the Union thereafter, the Supreme Court, in *Shively vs. Bowlby*, has furnished a source of history of the treatment of riparian rights of enormous magnitude, and through its study, one is oriented to the broad spectrum, and range of treatment, of the subject by the individual States. This concept is fundamental if one is to now attempt to define and understand riparian rights within the United States. Available treaties, encyclopedic compendiums, and conclusions based upon summaries of annotations must be read and considered in the light of the cardinal principle that the decisions of the individual states are based upon the law as it had been established within the individual states, and unless the law in force in the State in which the appellate decision has been rendered is identical with that in Maryland, the decision of the foreign jurisdiction, or the interpretation of a federal tribunal based upon the law of that foreign jurisdiction, is neither persuasive nor controlling.

If the strict trust theory proposed by the Complainant is the law in other jurisdictions, it is certainly not the law in Maryland. Without belaboring the issue with repetition of authorities recently enumerated and discussed by this Court in No. 8935 Chancery, the Court would merely observe that, beginning with the Acts of 1745 and continuing through the Acts of 1970, the Legislature of Maryland has recognized the existence of certain riparian rights in pri-

vate land owners. A long line of judicial decisions of the Court of Appeals of Maryland and Federal Courts interpreting Maryland Law, have protected, enforced, interpreted and arbitrated these rights, beginning, at least, in 1815, with *The Wharf Case*, reported in 3 Bland at page 361, and continuing through *Causey vs. Gray*, in 1968, reported in 250 Md. at page 380, and through November 12, 1969, in *Western Contracting Corporation vs. Titter*, reported in 255 Md. at page 581.

The most specific pronouncement of the General Assembly of Maryland, however, upon the narrow issue sought by the Complainant to be raised against The Board of Public Works of Maryland is contained in Section 15 of Article 78A of The Annotated Code of Maryland. Without quoting that lengthy section in full in this Opinion, since 1945, The Board of Public Works of Maryland has been granted specifically the following power:

“Any real or personal property of the State of Maryland or of any Board, Commission, Department or Agency thereof, and any legal or equitable rights, interests, privileges or easements, in, to, or over the same, may be sold, leased, transferred, exchanged, granted or otherwise disposed of to any person, firm, corporation, or to the United States, or any agency thereof, or to any Board, Commission, Department or other agency of the State of Maryland for a consideration adequate in the opinion of the Board of Public Works, or to any county or municipality in the State subject to such conditions as The Board of Public Works may impose . . . As used herein, the term ‘real or personal property or any legal or equitable rights, interests, privileges for easements in, to, or over the same’ shall include the inland waters of the State and land under said waters, as well as the land underneath the Atlantic Ocean for a distance of three miles from the low watermark of the coast of the State of Maryland bordering on said ocean, and the waters above said land . . .”

The language which Counsel for the Complainant has selected from *Shively vs. Bowlby* with regard to the imposi-

tion of a trust does not apply to the type of trust which the Complainant espouses. The factual situation in *Shively vs. Bowlby* presented the issue as to whether or not a purported grant from the United States of America, while the area was a territory under the jurisdiction of the Federal Government, took precedence over a grant by the State of Oregon for the same land. The Court determined that the United States had no power to make such a grant because the Federal Government held the land in trust pending the formation of the new State. If one will read the last ten paragraphs of the Opinion, the thrust of the entire opinion will become most evident. The type of trust referred to therein bears no resemblance to the type of trust here urged upon the Court.

The pleadings, memoranda, and arguments in this case have been filled with references to various possible disastrous consequences by the adoption of the position of one party or the other. The Court refuses to speculate, and does not base this Opinion upon any unproven allegations, either favorable or unfavorable to the Complainant, but, if one had the time, it might be an interesting mental exercise to conceive of replacing the shorelines of The State of Maryland to their composition and contour, and in all their pristine beauty, of the year 1634. Such would be the logical, if unreasonable, result should the theory of the Complainant be adopted, and the requested "Mandatory Injunction" issued by this Court.

Adapting, as she has, the theory of her cause of action, the Court can see no reasonably possible manner in which the Bill of Complaint can be amended to avoid its basic infirmity, nor any need for any further delay in granting an opportunity for such an amendment.

Having reached this decision in the matter, it becomes unnecessary to consider the standing of the Complainant to sue.

It is, therefore, this 31st day of August, 1970, by the Circuit Court for Worcester County, Maryland, ORDERED that:

1. The Petition to Intervene as Plaintiffs filed by the "North American Habitat Preservation Society" and R. Doyle Grabarek, President, and Individually, on January 26, 1970, is DENIED;
2. The Motion Ne Recipiatur filed by Defendant James B. Caine, Inc., to the said Petition to Intervene as Plaintiffs, on February 27, 1970, is DENIED;
3. The Motion Ne Recipiatur filed by Complainant to the said Motion Ne Recipiatur filed by the Defendant James B. Caine, Inc., on March 11, 1970, is DENIED;
4. The Motion Raising Preliminary Objection filed by the Defendant James B. Caine, Inc., on October 21, 1969, is DENIED;
5. The Motion Ne Recipiatur filed by Complainant to Demurrer of the Defendant Maryland Marine Properties, Inc., on November 7, 1969, is DENIED;
6. The Demurrer of Defendant Maryland Marine Properties, Inc., to the Bill of Complaint, filed on October 20, 1969, is SUSTAINED, without leave to the Complainant to amend;
7. The Demurrer of Defendant Board of Public Works to the Bill of Complaint, filed on October 21, 1969, is SUSTAINED, without leave to the Complainant to amend; and
8. The "Motion of Complainant for Summary Judgment Upon Same Issues" filed by the Complainant on May 11, 1970, being more in the nature of a Demand for Admission of Facts, (which would have been a more appropriate Pleading) is GRANTED, the facts therein having been conceded in the absence of any response thereto by the Defendants; and
9. The Complainant shall pay the costs of this proceeding.

DANIEL T. PRETTYMAN,
Judge

TRUE COPY, TEST: Frank W. Hales, Clerk

DOCKET ENTRIES

1969, Sept. 30. Bill of Complaint for a Mandatory Injunction, and for Declaratory Relief and Interrogatories to the Defendant Board, filed.

1969, Sept. 30. Subpoena with copies issued, together with copies of Bill of Complaint for a Mandatory Injunction, and for Declaratory Relief and Interrogatories to the Defendant Board attached and mailed to the Sheriff of Baltimore City and delivered to the Sheriff of Worcester County for service.

“Summoned James B. Caine, Inc., by service upon James B. Caine and Maryland Marine Properties, Inc., by service upon Raymond D. Coates severally by leaving with each of them a copy of the Writ, together with Bill of Complaint for Mandatory Injunction and a Declaratory Relief Interrogatories to the Defendant Board attached this 30th day of September, 1969. So ans.”
R. Calvin Hall, Sheriff, By: James N. Jarman, Deputy Sheriff.

“Non Est as to Hon. Marvin Mandel, Governor”, J. Mufken, Frank J. Pelz, Sheriff.

“Copy of the Process with a copy of Bill of Complaint served on Francis B. Burch, Esq., Attorney General of Maryland at One Charles Center, at 2:05 P.M. on the first day of October, 1969, in the presence of Sol Damoff”, Frank J. Pelz, Sheriff.

1969, Oct. 9. Second Subpoena with copy issued, together with a copy of Bill of Complaint for a Mandatory Injunction and for Declaratory Relief and Interrogatories to the Defendant Board attached and mailed to the Sheriff of Baltimore City for service on the Governor.

1969, Oct. 20. Demurrer of Defendant, Maryland Marine Properties, Inc., and Certificate of Service thereon, filed.

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1969, Oct. 20. Memorandum of Law of Defendant, Maryland Marine Properties, Inc., in Support of Demurrer, filed.

1969, Oct. 21. Demurrer of Defendant Board of Public Works and Certificate of Service thereon, filed.

1969, Oct. 21. Motion Raising Preliminary Objection, Request for Hearing and Certificate of Service thereon, filed.

“Summoned Honorable Marvin Mandel, Governor, and a copy of the process with a copy of the Bill of Complaint left with the defendant at 301 W. Preston St., at 12:30 P.M. on the 27 day of October, 1969 in the presence of John Nuller, III”, Frank J. Pelz, Sheriff.

1969, Nov. 6. Reply to “Memorandum of Law of Maryland Marine in Support of Demurrer” and certificate of service thereon, filed.

1969, Nov. 7. Motion Ne Recipiatur to Demurrer of Maryland Marine. Memorandum of Authorities and Certificate of Service thereon, filed.

1969, Nov. 17. Answer to Motion Raising Preliminary Objection, Memorandum of Authority and Certificate of Service thereon, filed.

1970, Jan. 26. Petition to Intervene as Plaintiffs, Affidavit, and Certificate of Service thereon, filed.

1970, Jan. 26. Unsigned Order to Show Cause, filed.

1970, Jan. 26. Order to Show Cause filed. Copies of Petition, Affidavit and Show Cause Order mailed to Hon. Marvin Mandel, the Governor of the State of Maryland, Louis L. Goldstein, Comptroller of Treasury, John Leutkemeyer, Treasurer, Board of Public Works of Maryland, James B. Caine, Inc., Ocean City, Maryland, and Maryland Marine Properties, Inc., Ocean City, Maryland.

1970, Feb. 24. Answer of Defendant, Maryland Marine Properties, Inc., to Petition to Intervene and Certificate of Service thereon, filed.

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- 1970, Feb. 27. Motion Ne Recipiatur as to Petition to Intervene as Plaintiffs and Certificate of Service thereon filed.
- 1970, March 11. Motion Ne Recipiatur, Memorandum of Rules in Authority and Certificate of Service thereon filed. Copy of same delivered to Lee W. Bolte, Esq.
- 1970, March 16. Copy of Motion Ne Recipiatur, Memorandum of Rules in Authority, and Amended Certificate of Service thereon filed.
- 1970, April 8. Letters written to: Hon. F. B. Burch and Jon F. Oster, Esq., L. W. Bolte, Esq., R. A. Shelton and T. P. Perkins, III, Esqs., R. D. Coates, Esq., R. M. Pollitt, Esq., and Leonard J. Kerpelman, Esq., setting case for Argument on all Demurrers, Motions, Petitions &c., filed as of the date of this notice, on Monday, May 11, 1970, at 10:00 A.M., per copies of letters filed.
- 1970, April 13. Receipt of notification of assignment date from Robert A. Shelton and Thomas P. Perkins, III, Esqs., filed.
- 1970, April 13. Receipt of notification of assignment date from Lee W. Bolte, Esq., filed.
- 1970, April 13. Receipt of notification of assignment date from Raymond D. Coates, Esq., filed.
- 1970, April 24. Receipt of notification of assignment date from Leonard J. Kerpelman, Esq., filed.
- 1970, April 24. Letter from Leonard J. Kerpelman, Esq., to Frank W. Hales, Clerk, filed.
- 1970, April 24. Copy of letter from Richard H. Outten, Assignment Clerk to Leonard J. Kerpelman, Esq., filed.
- 1970, May 5. Plaintiff's Memorandum of Law, Table of Contents, and Certificate of Service thereon filed.
- 1970, May 6. Memorandum of Law of Defendant James B. Caine, Inc., and Certificate of Service thereon filed.
- 1970, May 11. Motion for summary judgment upon some Issues, Affidavit and Certificate of Service thereon, filed.

- 1970, May 11. Judge Daniel T. Prettyman on the Bench. Dave Dawson reporting.
- 1970, May 11. Leonard J. Kerpelman, Lee W. Bolte, Jon Oster, Raymond D. Coates, Thoman P. Perkins, III, Esqs. in Court.
- 1970, May 11. Hearings and Argument had on all preliminary Demurrers, Motions and Petitions filed as of this date. Rulings held sub-curia.
- 1970, May 11. The Motion for summary judgment upon some issues filed May 11, 1970, at 9:30 A.M., is reserved for future Argument and disposition.
- 1970, May 15. Answer to Memorandum of Law of Defendant James B. Caine, Inc., and Certificate of Service thereon filed.
- 1970, June 17. Supplementary Plaintiff's Memorandum of Law, and Certificate of Service filed.
- 1970, Aug. 31. Ordered that:—
1. The Petition to Intervene as Plaintiffs filed by the "North American Habitat Preservation Society and R. Doyle Grabarek, President and Individually, on January 26, 1970, is DENIED;
 2. The Motion Ne Recipiatur filed by Defendant James B. Caine, Inc., to the said Petition to Intervene as Plaintiffs, on February 27, 1970, is DENIED;
 3. The Motion Ne Recipiatur filed by Complainant to the said Motion Ne Recipiatur filed by the Defendant, James B. Caine, Inc., on March 11, 1970, is DENIED;
 4. The Motion Raising Preliminary Objection filed by the Defendant James B. Caine, Inc., on October 21, 1969, is DENIED;
 5. The Motion Ne Recipiatur filed by Complainant to Demurrer of the Defendant Maryland Marine Properties, Inc., on November 7, 1969, is DENIED;

6. The Demurrer of Defendant Maryland Marine Properties, Inc., to the Bill of Complaint, filed on October 20, 1969, is SUSTAINED, without leave to the Complainant to amend;
7. The Demurrer of Defendant Board of Public Works to the Bill of Complaint, filed on October 21, 1969, is SUSTAINED, without leave to the Complainant to amend;
8. The "Motion of Complainant for summary judgment upon same Issues" filed by the Complainant on May 11, 1970, being more in the nature of a Demand for Admission of Facts, (which would have been a more appropriate Pleading) is GRANTED, the facts therein having been conceded in the absence of any response thereto by the Defendants; and
9. The Complainant shall pay the costs of this proceeding, per Opinion and Order for Court filed. Copies of the Opinion and Order of Court mailed to Leonard J. Kerpelman, Esq., Jon F. Oster, Esq., Asst. Attorney General, Richard M. Pollitt, Esq., Lee W. Bolte, Esq., Raymond D. Coates, Esq., and to Thomas P. Perkins, III, Esq.

1970, Sept. 2. Demurrer of Defendant James B. Caine, Inc., and Certificate of service filed.

1970, Sept. 2. Answer to Petition to Intervene and Certificate of Service filed.

1970, Sept. 22. ORDERED that, for the reasons assigned in the Opinion and Order of this Court filed on August 31, 1970, which said Opinion is specifically incorporated herein, by reference thereto, as though fully set forth herein, the "Petition To Intervene as Plaintiffs" filed by the "North American Habitat Preservation Society" and R. Doyle Grabarek, on January 26, 1970, be, and the same is hereby DENIED, and the Demurrer of James B. Caine, Inc., be, and the same is hereby, SUSTAINED, without leave to the Complainant to amend, per Order of Court, filed. Copies of Order of Court mailed to Leonard

J. Kerpelman, Esq., Jon F. Oster, Esq., Asst. Attorney General, Richard M. Pollitt, Esq., Lee W. Bolte, Esq., Raymond D. Coates, Esq., and Thomas P. Perkins, III, Esq.

1970, Sept. 29. Order for Appeal and Certificate of Service filed.

1970, Oct. 1. Photo copy of Amended Statement of costs dated October 1, 1970, mailed to Leonard J. Kerpelman, Esq., Hon. Francis B. Burch, Jon F. Oster, Esq., Richard M. Pollitt, Esq., Lee W. Bolte, Esq., Raymond D. Coates, Esq., Thomas P. Perkins, III, Esq., and Robert A. Shelton, Esq., Copy of Amended Statement of costs filed.

1970, Oct. 5. Letter dated October 1, 1970, from Leonard J. Kerpelman Esq., Baltimore, Maryland, to David Dawson, Court Reporter, filed.

1970, Oct. 7. Letter from Leonard J. Kerpelman, Esq., to Clerk, Worcester County Court, reply of Clerk at bottom of letter, copy of statement of costs dated Sept. 2, 1970, and copy of Amended Statement of costs dated October 1, 1970, filed. Copy of said letter, reply and statements of costs mailed to Leonard J. Kerpelman, Esq.

1970, Oct. 8. Photo copy of Notice advising attorneys of record the case is ready for inspection and transmission to the Court of Appeals, mailed to Leonard J. Kerpelman, Esq.; Hon. Francis B. Burch; Hon. Jon. F. Oster; Richard M. Pollitt, Esq.; Lee W. Bolte, Esq.; Raymond D. Coates, Esq.; Thomas P. Perkins, III, Esq.; and Robert A. Shelton, Esq., per original notice, filed.

1970, Oct. 26. Order to enter an appeal to the Court of Appeals of Maryland from the Judgment of the Court dated Sept. 22, 1970, per Order filed.

ORDER OF COURT [SEPT. 22, 1970]

On September 2, 1970, the Defendant, James B. Caine, Inc., filed its "Answer To Petition To Intervene" and a "Demurrer" to the Bill of Complaint filed herein. The

same having been duly read and considered, it is this 22nd day of September, 1970, by the Circuit Court for Worcester County, Maryland, under the authority contained in Maryland Rule 1210 c, ORDERED that, for the reasons assigned in the Opinion and Order of this Court filed on August 31, 1970, which said Opinion is specifically incorporated herein, by reference thereto, as though fully set forth herein, the "Petition To Intervene As Plaintiffs" filed by the "North American Habitat Preservation Society" and R. Doyle Grabarek, on January 26, 1970, be, and the same is hereby, DENIED, and the Demurrer of James B. Caine, Inc., be, and the same is hereby, SUSTAINED, without leave to the Complainant to amend.

DANIEL T. PRETTYMAN,
Judge

MOTION TO DISMISS APPEAL

James B. Caine, Inc., Appellee, by Sanford and Bolte, its Attorneys, moves this Honorable Court, pursuant to Maryland Rule 835, subsection b (3), that this Appeal be dismissed as to said Appellee. The grounds of the Motion are as follows:

1. No Order for Appeal was filed with the Clerk of the Court below within thirty (30) days from the date of the Order appealed from, as prescribed by Maryland Rule 812, the aforesaid Order in favor of the Defendants, having been entered on September 22, 1970, and the Appeal therefrom having been filed on October 26, 1970. The Appeal should therefore be dismissed under Rule 835, subsection b (3).

Appellee further desires that this Motion be set down for oral argument in advance of the argument on the merits. Said Appellee believes that the grounds of the Motion are such that the disposition of this Motion will make argument on the merits unnecessary as to said Appellee.

SANFORD AND BOLTE

LAW OFFICES OF
O'CONOR & SWEENEY
ONE CHARLES CENTER
BALTIMORE, MARYLAND 21201

HERBERT R. O'CONOR, JR.
JOHN J. SWEENEY, JR.
G. M. ZACHARSKI, JR.

September 7, 1971

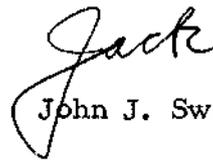
SUITE 1218
—
MULBERRY 5-1141

Henry R. Lord, Esquire
Deputy Attorney General of Maryland
1400 One South Calvert Building
Baltimore, Maryland 21202

Dear Harry:

Enclosed please find a card from the Supreme Bench of Baltimore City indicating that case number 2914-A (Kerpelman v. Burch) is in for trial on October 5. You will note that this card was sent to your illustrious predecessor, but I understand that between sky dives you are assuming some of his duties.

Sincerely,



John J. Sweeney, Jr.

JJS:cm

Enclosure

OFFICES OF THE ATTORNEY GENERAL
ONE SOUTH CALVERT BUILDING
CALVERT AND BALTIMORE STREETS
BALTIMORE, MARYLAND 21202

October 2, 1973

Leonard J. Kerpelman, Esq.
2403 Rogers Building
Baltimore, Maryland 21209

Re: Elinor H. Kerpelman v. Frank B. Burch,
Attorney General of Maryland

Dear Mr. Kerpelman:

Please forward your check in payment of court costs in
the above-captioned case so that this case may be closed.

Very truly yours,

Francis X. Pugh
Assistant Attorney General

FXP:jr

*Mr. Burch -
how
about a thank
you letter
to Bill?
209*

LAW OFFICES
WEINBERG AND GREEN
TWENTIETH FLOOR
10 LIGHT STREET
BALTIMORE, MD. 21202

- | | |
|------------------------|--------------------------|
| LEONARD WEINBERG | RONALD E. CREAMER |
| MILTON S. SCHILLER | DAVID M. BLUM |
| ROBERT F. SKUTCH, JR. | JOHN R. ROYSTER |
| J. PAUL SCHMIDT | J. EDWARD DAVIS |
| ROBERT L. WEINBERG | ROGER K. GARPINK |
| J. C. MERRIMAN | WILBUR C. JENSEN |
| WINSTON T. BRUNDIGE | SAMUEL J. MILLER, JR. |
| WILLIAM W. CAHILL, JR. | JACOB B. DAVIS |
| JOHN J. GHINGHER, JR. | EARL F. LEITESS |
| MARK D. COPLIN | HOWARD B. MILLER |
| JAMES H. LANGRALL | BARRY D. BERMAN |
| HERBERT H. HUBBARD | L. HOLLINGSWORTH PITTMAN |
-
- | | |
|------------------------|---------------------------|
| T. CONWAY MATTHEWS | JACK N. ZEMIL |
| SHELDON S. SATISKY | ROBERT W. CANNON |
| WILLIAM H. HOLDEN, JR. | JOHN J. GHINGHER, III |
| STANLEY J. NEUMAUER | MICHAEL R. DEUTSCHMAN |
| RICHARD J. HIMELFARB | THEODORE R. McKELDIN, JR. |
| LESUE J. POLY | JAMES J. HANKS, JR. |
| HERBERT BETTER | VERA R. KAMINSKI |
| WILLIAM E. SCHOLTES | ANNE KAY KRAMER |

GEORGE COCHRAN DOUB
CHARLES J. STINCHCOMB
COUNSEL
—
HARRY J. GREEN
1906-1964
—
(301) 539-2125
—
CABLE ADDRESS "WEITEN"

October 12, 1970

Robert F. Sweeney, Esquire
Deputy Attorney General
1200 One Charles Center
Baltimore, Maryland 21201

Re: **Kerpelman v. Burch**

Dear Bob:

I am now closing our file, and I enclose herewith
conformed copy of the final Order of Court.

Sincerely yours,

Bill

William W. Cahill, Jr.

14:bb
Enclosure

28-1106-1382

SUPREME BENCH OF BALTIMORE CITY

Jury CENTRAL ASSIGNMENT BUREAU Equity A

Non-Jury Phone 752-4918 Equity B

ROOM 419 COURT HOUSE

You will please take notice that the following cases on the Trial Docket
are set for trial on Oct 14 - 2914-A - Kerpelman
Case(s) No. vs. Burch (Atty Gen)

Requests for postponement
must be made 7 days prior
to trial date.

JAMES V. CAMPBELL,
Assignment Commissioner.



Robt. F. Sweeney, Esq.
1 Charles Center

21201

SHORE CONFLICT DENIED BY BURCH

Attorney General Admits
Owning Oceanfront Lots

By GERALD A. FITZGERALD

Maryland's attorney general admitted in court yesterday that he holds a financial interest in an oceanfront real estate development in Ocean City.

Francis B. Burch, the state's chief law officer, said that his interest in two oceanfront lots, however, represents no conflict with his duty as attorney general to defend recent sales of state-owned tidal wetlands to real estate developers in Worcester county.

Formal Denial

A recent suggestion by a Baltimore lawyer of conflict between Mr. Burch's personal interest in the property and his public duties in the wetlands case was "scurrilous, . . . entirely unjustified and prompted by highly questionable motives," the attorney general said.

The admission and protest appeared in a formal denial which Mr. Burch's lawyers entered yesterday to a charge by Leonard J. Kerpelman in a recent suit asking that the attorney general be enjoined from

(Continued, Page C 14, Col. 6)

Kerpelman
Burch
✓

SHORE CONFLICT DENIED BY BURCH

Attorney General Admits Owning Oceanfront Lots

(Continued from Page C 28)

participating in further litigation involving the wetlands.

In a letter to Governor Mandel, a copy of which was attached to the court papers, Mr. Burch also asked that the Governor seek a review of Mr. Kerpelman's charge by the ethics committee of the State Bar Association.

Mr. Burch said that he suggested the referral because "if you were to make a determination as to any possible conflict on my part, Mr. Kerpelman in turn [might] make an unfounded and malicious charge that you, too, were guilty of a conflict. . . ."

Mandel Defendant

As a member of the Board of Public Works, Governor Mandel is one of the defendants named in another suit Mr. Kerpelman filed in the Worcester County Circuit Court to challenge the sale of 360 acres of wetlands last year.

Mr. Burch said that his Ocean City real estate holdings consisted of a 10.5 per cent interest in 200 feet of ocean-front property he and nine partners purchased on March 15, 1969, and an option to buy 245 feet of adjoining ocean frontage, which he said the partnership purchased in January of this year.

A franchise has been obtained by the partnership from Holiday Inns of America, Mr. Burch said, and he added that construction of a motel is expected to begin shortly at the site.

"I own no other real estate, either directly or indirectly, which fronts upon oceans, rivers, bays or other navigable bodies of water in Maryland, and specifically have no interest in real property fronting upon Sinepuxent or Assowman Bay in Worcester county," Mr. Burch said.

The sales which Mr. Kerpelman is challenging—both involving submerged lands on the bay side of the narrow sandpit—were made to James B. Caine, a Worcester county developer, and Maryland Marine Properties, Inc., which exchanged parcels of land elsewhere in the county for the wetlands it received from the state.

The suit questions the authority of the board of Public Works to make such transfers, and complains, further, that the state received too little from the developers in return for the wetlands.

To G. Owen

Date 2-3 Time 10:50

WHILE YOU WERE OUT

M. Mr. Cahill

of _____

Phone 539-2125

Area Code Number Extension

TELEPHONED		PLEASE CALL	
CALLED TO SEE YOU		WILL CALL AGAIN	
WANTS TO SEE YOU		URGENT	
	RETURNED YOUR CALL		

Message Mr. Kerpelman

has agreed to postpone

next - will notify

Operator

Kerpelman J. Burch

Cobell called 3:50

Kerpelman rose and on
matters, per Campbell, Cobell
told him Summary Jd. to
be deposed of.

Campbell says he called
Kerpelman, but he didn't return

his call. As far as
Campbell is concerned
will not be on for 4/11

If any change, Cobell
will call you tomorrow
a.m.

*Guaranteed
trial. R/S
Mr. Swaney*

3/8/70

28-1106-1382

SUPREME BENCH OF BALTIMORE CITY

Jury CENTRAL ASSIGNMENT BUREAU Equity A

Non-Jury Phone 752-4918 Equity B

ROOM 419 COURT HOUSE

You will please take notice that the following cases on the Trial Docket
are set for trial on April 1 - 2914-A - Kerpelman

Case(s) No. vs Burch

**Requests for postponement
must be made 7 days prior
to trial date.**

JAMES V. CAMPBELL,
Assignment Commissioner.

SUPREME BENCH OF BALTIMORE CITY

Jury	<input type="checkbox"/>	CENTRAL ASSIGNMENT BUREAU	Equity A	<input checked="" type="checkbox"/>
Non-Jury	<input type="checkbox"/>	Phone 752-4918	Equity B	<input type="checkbox"/>

ROOM 419 COURT HOUSE

You will please take notice that the following cases on the Trial Docket are set for trial on Feb. 5, 2914-A, Kerpelman v. Burch

Case(s) No. _____

Requests for postponement must be made 7 days prior to trial date.

JAMES V. CAMPBELL,
Assignment Commissioner.

COPY

LAW OFFICES

WEINBERG AND GREEN

TWENTIETH FLOOR
10 LIGHT STREET
BALTIMORE, MD. 21202

LEONARD WEINBERG
MILTON S. SCHILLER
ROBERT F. SKUTCH, JR.
J. PAUL SCHMIDT
ROBERT L. WEINBERG
J. C. MERRIMAN
WINSTON T. BRUNDIGE
WILLIAM W. CAHILL, JR.
JOHN J. GHINGHER, JR.
MARK D. COPLIN

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HOWARD M. FRIEDEL
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EARL F. LEITESS
BARRY D. BERMAN
SHELDON S. SATISKY
WILLIAM H. HOLDEN, JR.
JAMES W. HOLTZWORTH
STANLEY J. NEUHAUSER

L. HOLLINGSWORTH PITTMAN
JULIAN I. JACOBS
PAUL S. BEATTY
RICHARD J. HIMELFARB
LESLIE J. POLT
HERBERT BETTER
WILLIAM E. SCHOLTES
JACK N. ZEMIL
ROBERT W. CANNON

GEORGE COCHRAN DOUB
JOSEPH ALLEN
CHARLES J. STINCHCOMB
COUNSEL

HARRY J. GREEN
1906-1964

AREA CODE 301
839-2125

CABLE ADDRESS "WEITEN"

February 4, 1970

**Mr. James V. Campbell
Assignment Commissioner
The Courthouse - Room 407
Baltimore, Maryland 21202**

**Re: Kerpelman v. Burch
78A/228/42831A
Cent. Assn. No. 2914A**

Dear Mr. Campbell:

By agreement of all counsel and after consulting Judge Perrott's calendar, the hearing on the Motion for Summary Judgment in the above captioned matter is now scheduled for 10:00 a.m. on Thursday, February 19, 1970; please docket accordingly.

Sincerely yours,

Bill

William W. Cahill, Jr.

14:gs

**cc: The Honorable James A. Perrott
Robert F. Sweeney, Esquire
Leonard J. Kerpelman, Esquire**

RFS

11/14

28-1106-1382

SUPREME BENCH OF BALTIMORE CITY

Jury CENTRAL ASSIGNMENT BUREAU Equity A

Non-Jury Phone 752-4918 Equity B

ROOM 419 COURT HOUSE

You will please take notice that the following cases on the Trial Docket are set for trial on Dec. 4-2914-A

Case(s) No. _____

Kerpelman
vs.

Buech

Requests for postponement must be made 7 days prior to trial date.

JAMES V. CAMPBELL,
Assignment Commissioner.

3

October 27, 1969

Wilbur D. Preston, Jr., Esq.
Sun Life Building
Charles Center
Baltimore, Maryland 21201

Dear Woodey:

In accordance with our telephone conversation, I am sending you the Kerpelman papers together with Bob Sweaney's letter to me so that you can advise General Burch as to what your Committee will be likely to say with reference to his alleged conflict of interest. Also enclosed is copy of a letter of October 24 to me from Lee Stuart Thomson raising the question about the attorney's lien and the obligation to strike an appearance.

Sincerely,

Eli Frank, Jr.
President

EFjr/bc
Enclosures

THE BALTIMORE COUNTY
BAR ASSOCIATION
TOWSON, MD. 21204

PLEASE REPLY TO:

Lee Stuart Thomson

414 Jefferson Bldg.

Towson, Maryland 21204

October 24, 1969

Eli Frank, Jr., Esq., President
Maryland State Bar Association, Inc.
905 Keyser Building
Baltimore, Maryland 21202

Dear Mr. Frank:

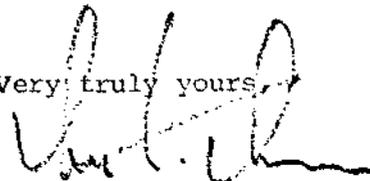
Pursuant to our telephone conversation of yesterday, I am writing, with the authority of the Committee on Grievances of The Baltimore County Bar Association, to request the advice and assistance of the Maryland State Bar Association in regard to a problem which has presented itself to the Committee in at least three separate complaints which are presently pending before it.

The question facing the Committee is essentially this: Where an attorney has accepted a case from a client, either on a contingent basis, a time basis or an agreed fee basis, and has entered suit on behalf of that client, is the attorney entitled upon being discharged by his client, to continue to maintain his appearance in the case in order to protect his fee if the same is on a contingent basis, or in order to insure the payment of his fee if the same is on a time basis or a fixed basis?

Our Committee is of the opinion that under the law there is no question that the attorney involved is entitled to maintain his lien by keeping his file, however, we have been unable to discover a rule, statute or case touching upon the question presented to us. Furthermore, the Committee was of the opinion that the question presented was of general importance, and thus we felt it in the best interests of all concerned to seek the guidance of the State Bar Association rather than to make an arbitrary decision on our own or to submit the question to our local association.

As I explained to you on the phone, the cases now pending before the Committee are all pending in Court, and thus the Committee feels that some fairly prompt decision must be made with regard to the complaints. Accordingly, it would be appreciated if we could hear from you at the earliest possible date.

Very truly yours,



Lee Stuart Thomson
Chairman

FRANCIS B. BURCH
ATTORNEY GENERAL

OFFICES OF



OCT 23 1969

ROBERT F. SWEENEY
DEPUTY ATTORNEY GENERAL

THE ATTORNEY GENERAL

1200 ONE CHARLES CENTER

BALTIMORE, MD. 21201

October 22, 1969

Eli Frank, Jr., Esq.
President
Maryland State Bar Association
Keyser Building
Baltimore, Maryland 21202

Dear Eli:

In accordance with our telephone conversation this afternoon, I am enclosing a copy of the Bill of Complaint of Elinor H. Kerpelman against the Attorney General, alleging conflicts of interest in his representation of the Board of Public Works, and our Answer thereto filed yesterday. You will note that the Attorney General's letter to the Governor is attached as Exhibit A to our Answer.

Also enclosed are copies of the Worcester County wetlands Bill of Complaint and our Demurrer thereto, which gave rise to the Kerpelman allegation.

If you should need any additional information, please get in touch with me.

Sincerely,



Robert F. Sweeney
Deputy Attorney General

RFS:imb

Enclosures

October 22, 1969

Eli Frank, Jr., Esq.
President
Maryland State Bar Association
Keyser Building
Baltimore, Maryland 21202

Dear Eli:

In accordance with our telephone conversation this afternoon, I am enclosing a copy of the Bill of Complaint of Elinor H. Kerpelman against the Attorney General, alleging conflicts of interest in his representation of the Board of Public Works, and our Answer thereto filed yesterday. You will note that the Attorney General's letter to the Governor is attached as Exhibit A to our Answer.

Also enclosed are copies of the Worcester County wetlands Bill of Complaint and our Demurrer thereto, which gave rise to the Kerpelman allegation.

If you should need any additional information, please get in touch with me.

Sincerely,

Robert F. Sweeney
Deputy Attorney General

RFS:imb

Enclosures

October 21, 1969

Honorable Marvin Mandel
Governor of Maryland,
State House
Annapolis, Maryland

Dear Governor Mandel:

Leonard J. Kerpelman, Esq. represents the complainant in a suit recently filed and now pending in the Circuit Court for Worcester County (Kerpelman v. Mandel, et al, Circuit Court for Worcester County, chancery # 8934, filed September 30, 1969) which seeks a reconveyance of the wetlands transferred by the Board of Public Works of Maryland to James B. Caine, Inc. and Maryland Marine Properties, Inc. Because Article V, Sect. 3 of the Maryland Constitution requires that I represent agencies and departments of the State Government, the suit papers were forwarded to me and I have just entered my appearance on behalf of the Board of Public Works of Maryland. The Bill of Complaint questions the authority of the Board of Public Works of Maryland to transfer wetlands property from public ownership to private ownership and alleges fraud and bad faith on the part of the members of the Board of Public Works, because of the purportedly inadequate consideration supporting the transfer.

Mr. Kerpelman, by a separate suit now seeks to enjoin me from representing the Board of Public Works of Maryland in the Worcester County litigation because of an alleged conflict of interest involving a personal real estate investment. I personally feel that the position of Mr. Kerpelman is scurrilous, is entirely unjustified and is prompted by highly questionable motives. In order to satisfy the trial courts where the litigation is pending, as well as the citizens of Maryland that no impropriety or conflict whatsoever exists, I am requesting that you review the matter, pursuant to your authority contained in Article 19 A of the Maryland Code, and advise whether in your opinion any conflict does exist.

Honorable Marvin Mandel
October 21, 1969
Page two

Article 19 A, as amended by Chapter 402 of the Laws of Maryland of 1969, permits you as Governor (as, I understand no Board of Ethics has as yet been appointed), to determine whether an agency head is personally and substantially involved as a State official in a judicial or other proceeding in which he has a "financial interest" as defined by Section 2 of the Article.

Since you are one of the defendants in the suit which Mr. Kerpelman has sought to enjoin me from participating in, it might be that if you were to make a determination as to any possible conflict on my part, Mr. Kerpelman in turn would make an unfounded and malicious charge that you too were guilty of a conflict because you were acting in a matter in which you yourself would have a personal interest. Therefore, you might want to consider referring the matter to the Committee on Ethics of the Maryland State Bar Association for an advisory opinion which you could take into consideration in making your final determination under the provisions of Article 19 A.

Along with nine other partners I have an interest in 200 feet of ocean-front property in the northern part of Ocean City, Maryland, which property was conveyed to the partnership by deed dated March 15, 1969, recorded among the land records of Worcester County on April 3, 1969. We also purchased on January 9, 1969 an option on the adjacent parcel consisting of an additional 245 feet of ocean-front property. We have obtained a franchise from Holiday Inns of America and intend to build a Holiday Inn facility on this property. We have obtained bids from several construction companies and anticipate commencement of construction in the near future with a target date for opening of April 15, 1971. My capital share in this venture is approximately 10.5%. I own no other real estate, either directly or indirectly, which fronts upon oceans, rivers, bays or other navigable bodies of water in Maryland and specifically have no interest in real property fronting upon Sinepatuxent Bay or Assowoman Bay in Worcester County.

It is my firm belief that the ocean-front property in which I have an interest can in no way be affected by the outcome of Mr. Kerpelman's suit respecting transfers of wetlands by the Board of Public Works of Maryland in the tidal bays in Worcester County.

Under these circumstances I would very much appreciate your reviewing this situation and advising me as soon as possible whether you find any conflict between my personal investment and my representation of the Board of Public Works of Maryland in the litigation in question.

Honorable Marvin Mandel
October 21, 1969
Page three

I am enclosing for your consideration a copy of the Bill of Complaint and Demurrer in the Worcester County suit and of the Bill of Complaint and Answer in Mr. Kerpelman's suit against me.

Very truly yours,

Francis B. Burch
Attorney General

October 21, 1969

Honorable Marvin Mandel
Governor of Maryland,
State House
Annapolis, Maryland

Dear Governor Mandel:

Leonard J. Kerpelman, Esq. represents the complainant in a suit recently filed and now pending in the Circuit Court for Worcester County (Kerpelman v. Mandel, et al, Circuit Court for Worcester County, chancery #8934, filed September 30, 1969) which seeks a reconveyance of the wetlands transferred by the Board of Public Works of Maryland to James B. Caine, Inc. and Maryland Marine Properties, Inc. Because Article V, Sect. 3 of the Maryland Constitution requires that I represent agencies and departments of the State Government, the suit papers were forwarded to me and I have just entered my appearance on behalf of the Board of Public Works of Maryland. The Bill of Complaint questions the authority of the Board of Public Works of Maryland to transfer wetlands property from public ownership to private ownership and alleges fraud and bad faith on the part of the members of the Board of Public Works, because of the purportedly inadequate consideration supporting the transfer.

Mr. Kerpelman, by a separate suit now seeks to enjoin me from representing the Board of Public Works of Maryland in the Worcester County litigation because of an alleged conflict of interest involving a personal real estate investment. I personally feel that the position of Mr. Kerpelman is scurrilous, is entirely unjustified and is prompted by highly questionable motives. In order to satisfy the trial courts where the litigation is pending, as well as the citizens of Maryland that no impropriety or conflict whatsoever exists, I am requesting that you review the matter, pursuant to your authority contained in Article 19 A of the Maryland Code, and advise whether in your opinion any conflict does exist.

Honorable Marvin Mandel
October 21, 1969
Page two

Article 19 A, as amended by Chapter 402 of the Laws of Maryland of 1969, permits you as Governor (as, I understand no Board of Ethics has as yet been appointed), to determine whether an agency head is personally and substantially involved as a State official in a judicial or other proceeding in which he has a "financial interest" as defined by Section 2 of the Article.

Since you are one of the defendants in the suit which Mr. Kerpelman has sought to enjoin me from participating in, it might be that if you were to make a determination as to any possible conflict on my part, Mr. Kerpelman in turn would make an unfounded and malicious charge that you too were guilty of a conflict because you were acting in a matter in which you yourself would have a personal interest. Therefore, you might want to consider referring the matter to the Committee on Ethics of the Maryland State Bar Association for an advisory opinion which you could take into consideration in making your final determination under the provisions of Article 19 A.

Along with nine other partners I have an interest in 200 feet of ocean-front property in the northern part of Ocean City, Maryland, which property was conveyed to the partnership by deed dated March 15, 1969, recorded among the land records of Worcester County on April 3, 1969. We also purchased on January 9, 1969 an option on the adjacent parcel consisting of an additional 245 feet of ocean-front property. We have obtained a franchise from Holiday Inns of America and intend to build a Holiday Inn facility on this property. We have obtained bids from several construction companies and anticipate commencement of construction in the near future with a target date for opening of April 15, 1971. My capital share in this venture is approximately 10.5%. I own no other real estate, either directly or indirectly, which fronts upon oceans, rivers, bays or other navigable bodies of water in Maryland and specifically have no interest in real property fronting upon Sinapatuxent Bay or Assowoman Bay in Worcester County.

It is my firm belief that the ocean-front property in which I have an interest can in no way be affected by the outcome of Mr. Kerpelman's suit respecting transfers of wetlands by the Board of Public Works of Maryland in the tidal bays in Worcester County.

Under these circumstances I would very much appreciate your reviewing this situation and advising me as soon as possible whether you find any conflict between my personal investment and my representation of the Board of Public Works of Maryland in the litigation in question.

Honorable Marvin Mandel
October 21, 1969
Page three

I am enclosing for your consideration a copy of the Bill of Complaint and Demurrer in the Worcester County suit and of the Bill of Complaint and Answer in Mr. Kerpelman's suit against me.

Very truly yours,

Francis B. Burch
Attorney General

#8874-A-1-1969 PUBLIC WORKS V.
ELINOR H. KERPELMAN (Dis. Ct.)
(Collection of costs from appea'

LEONARD J. KERPELMAN

1645

Dec. / 19 72 ⁸⁻¹²/₄₃₀

PAY TO THE ORDER OF

FRANKIS B. BURCH - WORLD'S GREATEST FASCIST ^{9/56}/₁₀₀

Ninety one and

⁵⁶/₁₀₀ DOLLARS

THE UNION NATIONAL BANK

OF PITTSBURGH

PITTSBURGH, PENNSYLVANIA 15222

MEMO

①:0430①①0012①: 00①①52156①①

Leonard J. Kerpelman
AS AGENT, NOT ATTORNEY

ORDER TO RECORD JUDGMENT



DISTRICT COURT OF MARYLAND FOR BALTIMORE CITY

TO CHIEF CONSTABLE OF THIS COURT:

Please record the following described judgment;

Date of order Nov 19 1972

Case No. 14708 - 72

Date of Judgment Nov 9 1972

Nature of Judgment Contract Judgment as given subject to a total credit of \$.....

Amount of Judgment \$82.56 Costs 18.00

Attorney's Fee —

Judgment against Eliwar H. Kerpelman
Name

..... 2403 W. Rogers Ave - 09
Address

Judgment in favor of Board of Public Works of Maryland
Name

.....
Address

[Signature]
Plaintiff or Plaintiff's Attorney

..... 1400 One South Calvert Bldg - 02
Address

I hereby certify that the above judgment was recorded in the District Court of Maryland for Baltimore City on 20 NOV 1972 in Recorded Index No. JJB-16 Folio 511, recording costs \$..... paid by plaintiff.

Chief Constable

By [Signature]

N. B. This order must be filed in duplicate by the plaintiff or his attorney.

January 22, 1973

Mr. Andrew Heubeck, Jr.
Secretary
Board of Public Works
State Treasury Building
Annapolis, Maryland 21404

Re: Kerpelman v. Board of Public Works
Court of Appeals of Maryland, Sept. Term, 1970 - No. 364

Dear Mr. Heubeck:

This is to advise you that we have finally been successful in collecting the amount of \$82.56 representing the printing costs of the Board of Public Works in accordance with the Mandate of the Court of Appeals of Maryland in the above captioned case.

Because of the peculiar manner in which the check was made out by Mr. Kerpelman, and because it included costs incurred by the State Law Department in filing a statement of claim in the District Court of Maryland, Mr. Kerpelman's check was deposited by the Law Department to the credit of the Treasurer of the State of Maryland to General Fund Revenue.

Since the Board of Public Works paid for printing the brief during the prior fiscal year there is no need to have the Treasurer's Office transfer the funds from the Law Department records to the Board of Public Works.

Please use this information for the Board of Public Works' agenda to note the close of the case.

Very truly yours,

Jon F. Oster
Assistant Attorney General

JFO/bw

November 28, 1972

Mrs. Elinor H. Kerpelman
2403 W. Rogers Avenue
Baltimore, Maryland 21209

Re: Board of Public Works of Maryland v. Elinor
H. Kerpelman, District Court of Md. 14708 A

Dear Mrs. Kerpelman:

There is now recorded as a judgment against you in the District Court of Maryland damages in the amount of \$82.56 and costs of \$9.00 arising out of your failure to pay the printing costs to the Board of Public Works in accordance with the Mandate of the Court of Appeals of Maryland in the case of Elinor H. Kerpelman v. Board of Public Works of Maryland et al., No. 364, Sept. Term 1970 in the Court of Appeals of Maryland.

I have been instructed by the Board of Public Works that these costs must be collected and I will appreciate your check as soon as possible. I regret that if you refuse to cooperate I will have to take other measures which will be costly and time consuming to you, however, I am sure you understand that I have no option in this matter.

Sincerely yours,

Jon F. Oster
Assistant Attorney General

JFO/bw

July 14, 1972

Mr. Lee Allison
Constable
District Court of Maryland
for Baltimore City
People's Court Building
Fayette & Gay Streets
Baltimore, Maryland 21202

Re: Board of Public Works v. Elinor H. Kerpelman
No. 14708-72

Dear Mr. Allison:

I enclose State Law Department check No. 7407 in the amount of \$4.00 to reissue the summons in the above captioned case. Frankly, I am at a loss to understand your inability to contact the Defendant who is listed in the telephone book and whose husband is a well-known attorney. I might add that this case was instituted at the instance of the Board of Public Works of Maryland which consists of the Governor, the State Comptroller and the State Treasurer. In view of the fact that this suit has been requested by the highest governing officials of this state I would suggest that you contact me personally by telephone if you are still unable to serve the Defendant. I have advised Mr. Kerpelman of the suit; he might be willing to accept service for his wife.

Very truly yours,

Jon F. Oster
Assistant Attorney General

JFO/bw
enc.

JUN--2-72

•14708 72

STANDARD FEE C-1 S

0.00

Date Filed

Case Number

Fee Paid

JUL 28 1972 AT 10:00 A.M.

Trial Date

At

This case will be tried on the day and time stamped hereon, unless notice to the contrary is mailed to you. If no Trial Date is so stamped, this is merely your receipt.



District Court of Maryland For Baltimore City

PEOPLES COURT BUILDING, FAYETTE & GAY STREETS, 21202

COPY

CIVIL

Always Refer to this Case by

WRIT OF SUMMONS

Case No. A

TO THE DEFENDANT SERVED HEREWITH: YOU ARE HEREWITH SUMMONED TO APPEAR FOR TRIAL ON _____ before the Administrative Judge of the District Court of Maryland for Baltimore City, in the suit instituted against you as shown below.

IMPORTANT NOTICE: If you intend to contest this case you must notify the court in writing within fourteen days of the service of this summons, otherwise judgment may be entered against you.

(The form attached below may be used for this purpose.)

To addressee's postal agent: If you signed the postal receipt for this summons and cannot deliver it or make its contents known to the defendant in time for the defendant to appear as directed, please advise the Court at once in writing, giving reasons.

By _____ Clerk.

STATEMENT OF CLAIM FOR SUMMARY JUDGMENT

(1) BOARD OF PUBLIC WORKS OF MARYLAND

State Office Building
Annapolis, Maryland 21401

Address (please use zip code)

(2) _____
First Middle Last Name

Address (please use zip code)

(3) _____
First Middle Last Name

Address (please use zip code)

(4) _____
First Middle Last Name

Address (please use zip code)

Plaintiff (s).

(1) ELINOR H. KERPELMAN

2403 W. Rogers Ave. - 21209

Address (please use zip code)

(2) _____
First Middle Last Name

Address (please use zip code)

(3) _____
First Middle Last Name

Address (please use zip code)

(4) _____
First Middle Last Name

Address (please use zip code)

Defendant(s).

SUES

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Mr. Clerk: Please docket this case in an action of contract

The particulars of the case are that pursuant to a Mandate of the Court of Appeals of Maryland, Number 364 of the September Term of 1970, a copy of which is attached hereto as the Plaintiff's Exhibit No. 1. the Defendant, Elinor H. Kerpelman, was ordered to pay the printing costs of the Plaintiff, Board of Public Works, in the amount of \$82.56, resulting from an appeal to said court entitled Elinor H. Kerpelman v. Board of Public Works of Maryland, and as of this time the said costs have not been paid,

and the Plaintiff claims \$ 82.56 dollars, with interest from May 12, 1971.

(Here insert exact amount sought to be recovered)

1400 One South Calvert Bldg. - 21202

Attorney's Address.

Francis B. Burch, Attorney General

Phone No., 383-3737

Jon F. Oster, Ass't Atty General

(Be sure to send this form to the Court if you dispute this claim)

Case No. A District Court of Maryland for Baltimore City.

vs.

I intend to be present at the trial of this case and demand proof of the plaintiff's claim.

Defendant

Attorney for defendant

Address

Address

Phone No. _____

(OVER)

Exact full names of parties must be given.

If more space is needed, please affix an additional sheet as a part of the particulars.

DO NOT WRITE IN THIS SPACE

RECORD OF SERVICE

RETURN DAY _____

CERTIFIED MAIL

summons mailed _____

at _____ M. Post Office number _____

Deputy Clerk _____

SUMMONED

by certified mail service in accordance with Chapter 612 of the Acts of 1965 of the General Assembly and the certified mail receipt dated _____ filed _____

Deputy Clerk _____

Non-delivery of certified mail summons having resulted from REFUSAL of delivery on _____ such summons was mailed on _____ by ordinary mail and defendant returned SUMMONED.

Deputy Clerk _____

Date _____

Certified Mail returned by Post Office with notation _____

Write delivered to CONSTABLE FOR PERSONAL SERVICE.

Deputy Clerk _____

Constable's Return:

Date _____

Constable _____

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Plaintiff moves for summary judgment on the ground that the defendant has no defense to the Plaintiff's claim, and that there is no genuine dispute between the parties as to any material fact, and that the Plaintiff is entitled to judgment as a matter of law.

BY: _____ Attorney for Plaintiff

AFFIDAVIT IN SUPPORT OF SUMMARY JUDGMENT

DISTRICT COURT OF MARYLAND FOR BALTIMORE CITY, SCT.

I HEREBY CERTIFY that, on this _____ day of June, 1972, before me, the subscriber, a Notary Public of the State of Maryland, personally appeared Jon F. Oster, Ass't Atty General (Name of Affiant) 1400 One S. Calvert Building (Address of Affiant), who being competent to testify to the matters hereinafter set forth, made oath in due form of Law that he is, ~~the Plaintiff's attorney~~, attorney for the Plaintiff

(Here insert capacity, and relationship of the affiant to the Plaintiff, in regard to the transaction in suit)

And makes oath that the defendant... herein is ~~not~~ in the military service as defined in the Soldier's and Sailor's Civil Relief Act of the United States, and he further made oath on personal knowledge, that there is justly due and owing by the Defendant to the Plaintiff in the within case the sum of Eighty-two Dollars ~~and~~ Fifty-six cents (\$ 82.56), with interest from (May 12, 1971), over and above all discounts and without deductions or set-off, under the following facts and circumstances, to wit:

(1) That the Plaintiff sold goods, advanced monies, did work or provided services to or for the Defendant, as fully set forth in the itemized statement, promissory note or other written obligation, attached hereto, which remains unpaid.

~~(2) That through negligence chargeable to the Defendant, damages were caused to the Plaintiff in the amount of \$82.56 as described on the attached itemized estimate of repair charges.~~

(Name of Repair Man)

(Address of Repair Man)

That the said damages were occasioned under the facts and circumstances more fully set forth in the Statement of Claim herein.

(3) That the Plaintiff's claim is based on the following facts:
A Mandate of the Court of Appeals to pay Plaintiff's printing costs in the amount of \$82.56.

(Attach additional page for further particulars and details, if necessary.)

NOTARIAL SEAL

AS WITNESS MY HAND AND NOTARIAL SEAL

Beverly P. Strohm
1 F Toylina Court, 21207

(Address) July 1, 1974

My Commission expires on _____

A Mandate of the Court of Appeals to pay Plaintiff's printing costs in the amount of \$82.56.

Strike out section which does not apply to your case

M. C. 11/1/70

MANDATE

Court of Appeals of Maryland

No. 354, September Term, 1970

Elinor H. Kerpelman

v.

Board of Public Works
of Maryland et al.

Appeal from the Circuit Court for
Worcester County.
Filed: October 20, 1970.
October 30, 1970: Motion to dismiss
appeal filed by James B. Caine, Inc.,
one of appellees.
November 16, 1970: Motion to dismiss
granted and that appeal dismissed.
April 12, 1971: Order of August 31,
1970, affirmed, the appellant to pay
the costs. Opinion by Barnes, J.

STATEMENT OF COSTS:

In Circuit Court:

Record \$25.00
Stenographer's Costs -

In Court of Appeals:

Filing Record on Appeal	\$ 20.00
Printing Brief for Appellant	NOT SUPPLIED
Reply Brief	
Portion of Record Extract — Appellant	
Appearance Fee — Appellant	10.00
Printing Brief for Appellee (Md. Marine Properties)	212.19
Printing Brief for Appellee (Bd. of Public Works)	2.36
Portion of Record Extract — Appellee	
Appearance Fee — Appellee (2)	20.00

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals, this twelfth day of May A. D. 1971.

Clerk of the Court of Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE

BOARD OF PUBLIC WORKS OF MARYLAND	:	IN THE
	:	DISTRICT COURT
Plaintiff	:	OF MARYLAND
v.	:	FOR
ELINOR H. KERPELMAN	:	BALTIMORE CITY
Defendant	:	No. 14708
	:	
	:	
	:	
	:	
	:	

O R D E R

Upon the foregoing Motion and Affidavit, it is this
 13th day of September, 1972

ORDERED by the Court that Robert L. Zouck, Jr., is authorized to execute service of the original summons and Statement of Claim for Summary Judgment in this case upon the Defendant, Elinor H. Kerpelman, at any place within the State of Maryland where the said Elinor H. Kerpelman may be found, with the same power and duty to execute said process as the Sheriff of Baltimore City. Robert L. Zouck, Jr., shall make return to this Court promptly after service, but in any event, not later than 10/19/72, the return day thereof, by filing an affidavit pursuant to Maryland Rule 116 c. The Clerk shall furnish to Robert L. Zouck, Jr., a copy of the writ of summons to be served in accordance with this order.

E. Paul Mason,] ..

Judge

BOARD OF PUBLIC WORKS OF
MARYLAND

Plaintiff

v.

ELINOR H. KERPELMAN

Defendant

: IN THE
:
: DISTRICT COURT
:
: OF MARYLAND
:
: FOR
:
: BALTIMORE CITY
:
: No. 14708

: : : : : : : :

MOTION FOR APPOINTMENT OF PRIVATE PERSON TO
SERVE PROCESS

Board of Public Works of Maryland, Plaintiff, by Francis B. Burch, Attorney General of the State of Maryland, and John F. Oster, Assistant Attorney General, its attorneys, move for an order, pursuant to Maryland Rule 116a, appointing a private person to execute service of process upon the Defendant, Elinor H. Kerpelman. The grounds of the motion are as follows:

1. On June 2, 1972, the Plaintiff filed this action against the Defendant, Elinor H. Kerpelman, claiming \$82.56, pursuant to a mandate of the Court of Appeals of Maryland, Number 364 of the September Term of 1970. The Defendant, Elinor H. Kerpelman, was ordered to pay printing costs of the Plaintiff, Board of Public Works, in the amount of \$82.56 resulting from an appeal to said court, entitled Elinor H. Kerpelman v. Board of Public Works of Maryland, and as of this time the costs have not been paid.

2. The Sheriff of Baltimore City has made repeated but unsuccessful efforts to serve original process upon the Defendant, Elinor H. Kerpelman.

3. The Plaintiff believes that a private person may succeed in executing service of process upon the said Defendant,

Elinor H. Kerpelman, and desires to engage for that purpose the services of Robert L. Zouck, Jr., who is a competent private person, over 21 years of age, and is not a party to this action.

Francis B. Burch
Attorney General

Jon F. Oster
Assistant Attorney General
One South Calvert Building
Baltimore, Maryland 21202
383-3737
Attorneys for Plaintiff

I HEREBY CERTIFY that a copy of the foregoing Motion for Appointment of Private Person to Serve Process and Affidavit attached thereto was mailed this day of September, 1972, to Elinor H. Kerpelman, Defendant, 2403 West Rogers Avenue, Baltimore, Maryland 21209.

Jon F. Oster

STATE OF MARYLAND)

) to wit:

CITY OF BALTIMORE)

I, JON F. OSTER, make oath that the following facts are true to the best of my knowledge, information and belief:

1. That pursuant to a mandate of the Court of Appeals of Maryland, Number 364 of the September Term of 1970, a copy of which is attached hereto, the Defendant, Elinor H. Kerpelman, was ordered to pay the printing costs of the Plaintiff, Board of Public Works, in the amount of \$82.56, resulting from an appeal to said court entitled Elinor H. Kerpelman v. Board of Public Works of Maryland, and as of this time the said costs have not been paid.

2. That the Sheriff of Baltimore City has made repeated but unsuccessful efforts to serve original process upon the Defendant, Elinor H. Kerpelman; copy of the return cards enclosed.

3. That the Plaintiff believes that a private person may succeed in executing service of process upon the said Defendant, Elinor H. Kerpelman, and desires to engage for that purpose the services of Robert L. Zouck, Jr., who is a competent private person, over the age of 21 years of age, and is not a party to this action.

I HEREBY CERTIFY that the foregoing statements made by me are true and correct to the best of my knowledge, information, and belief.

Jon F. Oster

Subscribed and sworn to before me this _____ day of
September, 1972.

Katherine D. Hudlin
Notary Public

My Commission Expires:

11-6-71

MANDATE

Court of Appeals of Maryland

No. 354, September Term, 1970

Elinor H. Kerpelman

v.

Board of Public Works
of Maryland et al.

Appeal from the Circuit Court for
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appeal filed by James B. Caine, Inc.,
one of appellees.
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granted and that appeal dismissed.
 April 12, 1971: Order of August 31,
1970, affirmed, the appellant to pay
the costs. Opinion by Barnes, J.

STATEMENT OF COSTS:

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Stenographer's Costs	-

In Court of Appeals:

Filing Record on Appeal	\$ 20.00
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Reply Brief	
Portion of Record Extract — Appellant	
Appearance Fee — Appellant	10.00

Printing Brief for Appellee (Md. Marine Properties)	212.19
Printing Brief for Appellee (Md. of Public Works)	2.26
Portion of Record Extract — Appellee	
Appearance Fee — Appellee (2)	20.00

STATE OF MARYLAND, Sec:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals, this twelfth day of May A. D. 1971.

Clerk of the Court of Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE

NON-EST-ONE DEFENDANT

DISTRICT COURT OF MARYLAND FOR BALTIMORE CITY

No. 14705-72

BOARD OF PUBLIC WORKS OF MARYLAND

Return date

vs.

7-13-72

ELMER H. KERPLEMAN

This office has been unable to summon the defendant in this case. Therefore, the case will not come up for trial on the date originally assigned. If you decide to carry the case further, it will be necessary for you to order a reissue of summons for the defendant, giving full particulars as to where he may be served. The charge for each reissue is \$4.00 for each defendant.

Failure to order reissue within one year from return date results in dismissal of the case.

NON EST

J. JEROME BUTLER, Chief Constable.

DC 1-23

unable to contact By [Signature]

Constable.

NON-EST-ONE DEFENDANT

DISTRICT COURT OF MARYLAND FOR BALTIMORE CITY

No. 14708-72

Board of Public Works of Maryland

Return date

vs.

Elmer H. Kerpleman

This office has been unable to summon the defendant in this case. Therefore, the case will not come up for trial on the date originally assigned. If you decide to carry the case further, it will be necessary for you to order a reissue of summons for the defendant, giving full particulars as to where he may be served. The charge for each reissue is \$4.00 for each defendant.

Failure to order reissue within one year from return date results in dismissal of the case.

J. JEROME BUTLER, Chief Constable.

unable to contact By [Signature]

DC 1-23

Constable.

CASE No. 1470 A

DISTRICT COURT OF MARYLAND

PARTIES

DISPOSITION

PLAINTIFF:

DEFAULT DATE

BOARD OF PUBLIC WORKS OF MARYLAND

AS TO DEPT. NO.		AS TO DEPT. NO.	
AS TO DEPT. NO.		AS TO DEPT. NO.	

DATE	DENIAL REC'D		BY
	FROM	DATE PLY F NOTIFIED	
DEPT. NO.			

DEFENDANT:

VS.

RETURN

NOV 9 1912

(1) Elinor H. Kerpelman
2403 W. Rogers Ave.-09

NON ESTI

NON ESTI

SUMMONED

(2)

(3)

(4)

(5)

JUDGMENT

SUMMARY

TRIAL

DEFAULT

PLAINTIFF APPEARED

CONCL'N

PARTIES APPEARED

CONFESSION

EXCEPT

IN FAVOR OF

PLAINTIFF

\$ 82.50 DAMAGES AND COSTS \$ 40.00
AGAINST

NOV 9 1912
DATE

JUDGE

JOSEPH C. ...

JUDGMENT MAILED

SPECIAL PROCEEDINGS

MOTION TO STRIKE FILED

MOTION GRANTED DENIED

F. SA

ATTORNEYS

FOR PLAINTIFF: Francis B. Burch
Jon F. Oster

NAME

1400 One South Calvert Bldg.-02

ADDRESS

FOR DEFENDANT:

NAME

ADDRESS

STATE OF MARYLAND

to wit:

CITY OF BALTIMORE

I, ROBERT L. ZOUCK, JR., make oath of the following facts:

(1) That pursuant to an order of the District Court of Baltimore City, I, Robert L. Zouck, Jr., being over 21 years of age, was appointed as a private person, to serve process on Elinor H. Kerpelman, in the case entitled Board of Public Works v. Elinor H. Kerpelman, and numbered 14708 in the District Court of Baltimore City.

(2) That on the 25th of September, 1972, at 8:25 P.M. I executed process on Elinor H. Kerpelman, who accepted the same, at her home, 2403 West Rogers Avenue, Baltimore, Maryland 21209.

I HEREBY CERTIFY that the foregoing statements made by me are true and correct to the best of my knowledge, information and belief.

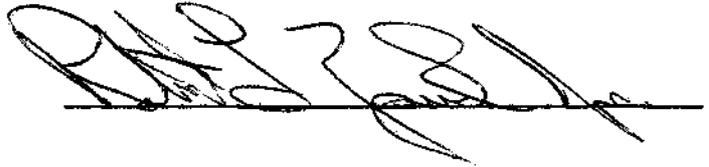
Robert L. Zouck, Jr.

Subscribed and sworn to before me this _____ day
of September, 1972.

Katherine D. Hudlin
Notary Public

My Commission Expires:

On the 25th day of September, 1972 at 8:25 P.M.
I arrived at the home of Elinor H. Kerpelman. When she
came to the door I explained that I was there to serve her
with process from the District Court of Baltimore City
resulting from the case of Board of Public Works v. Elinor
H. Kerpelman. Mrs. Kerpelman accepted process but after
conference with her husband he was heard to exclaim, "If
that young man is from the Attorney General's Office
tell him that I'll be seeing him in the newspapers." Mrs.
Kerpelman then accepted process.

A handwritten signature in black ink, appearing to be "R. J. [unclear]", written over a horizontal line.